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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES ex rel. HAROLD R. FINE,

Petitioner,

v.

CHEVRON, U.S.A., INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a former employee of the Office of Inspector General is precluded as a matter of law from serving as a *qui tam* relator under the False Claims Act.

2. Whether a former employee of the Office of Inspector General is precluded as a matter of law from qualifying as an "original source" under the False Claims Act.

3. Whether a government employee is precluded as a matter of law from qualifying as an "original source" under the False Claims Act.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Harold R. Fine and the respondents, Chevron U.S.A., Inc.; Bechtel Petroleum Operations, Inc.; Williams Brothers Engineering Company; The University of California; and the Board of Regents of The University of California. The United States filed *amicus curiae* briefs in the district court and presented oral argument there. The United States also filed an *amicus curiae* brief in the United States Court of Appeals for the Ninth Circuit and, by leave of court, presented argument before the Court of Appeals sitting *en banc*.

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Petitioner Harold R. Fine respectfully prays that a writ of certiorari issue to review the judgment and *en banc* opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on December 12, 1995.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at 72 F.3d 740, and is reprinted in the appendix hereto, p. 1a, *infra*.

The panel opinion of the United States Court of Appeals for the Ninth Circuit is reported at 39 F.3d 957, and is reprinted in the appendix hereto, p. 29a, *infra*.

The opinion of the United States District Court for the Northern District of California in *United States ex rel. Fine v. The University of California, et al.* (Smith, D.J.) is reported at 821 F.Supp. 1356, and is reprinted in the appendix hereto, p. 43a, *infra*.

The oral opinion of the United States District Court for the Northern District of California in *United States ex rel. Fine v. Chevron, U.S.A., Inc., et al.* (Schnacke, D.J.) is unreported and is reprinted in the appendix hereto, p. 56a, *infra*.

JURISDICTION

Petitioner filed two *qui tam* actions under the False Claims Act ("FCA") in the United States District Court for the Northern District of California invoking federal

jurisdiction pursuant to 31 U.S.C. § 3730(b). The first *qui tam* action was brought against respondents, Chevron U.S.A., Inc.; Bechtel Petroleum Operations, Inc.; and Williams Brothers Engineering Company. Each of the respondents filed a motion to dismiss. The United States declined to intervene and filed an *amicus curiae* brief in support of the respondents' motions to dismiss. On December 16, 1992, the district court entered a final judgment dismissing the case for lack of subject matter jurisdiction. (p. 55a, *infra).*

The second *qui tam* action was brought against respondents The University of California and the Board of Regents of The University of California. Respondents filed a motion to dismiss. Again, the United States declined to intervene and filed an *amicus curiae* brief in support of the respondents' motion to dismiss. On April 5, 1993, the district court entered a final judgment dismissing the case for lack of subject matter jurisdiction. (p. 57a, *infra*).

Petitioner appealed both dismissals. The appeals were consolidated and on November 2, 1994, a panel of the United States Court of Appeals for the Ninth Circuit issued a unanimous opinion reversing the district court's dismissals of both *qui tam* actions and remanding the cases for further proceedings. (p. 29a, *infra*). Thereafter, on suggestion of respondents supported by the United States as *amicus curiae*, the Ninth Circuit voted to rehear the consolidated appeals *en banc*. On December 12, 1995, a divided *en banc* court vacated the panel decision and affirmed the district court's dismissals of petitioner's *qui tam* actions. The *en banc* decision contained five separate opinions. (p. 1a, *infra*). No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

31 U.S.C. § 3730. Civil actions for false claims

* * *

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

* * *

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any

officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a Congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

From September 1982 to July 18, 1991, petitioner was employed by the United States Department of Energy ("DOE"), Office of Inspector General ("OIG"), in the Office of Audits. At the time he retired, petitioner held the title of Assistant Manager, Western Region Audit

Office and was stationed in Albuquerque, New Mexico. As part of his job responsibilities, petitioner conducted audits and supervised others who conducted audits of contracts entered into by DOE. Through his experience as an auditor in the OIG, petitioner became acutely attuned to and aware of instances of fraud and false claims against the government by government contractors. After repeated efforts by petitioner to focus the attention of his superiors on the fraud and false claims being perpetrated by respondents, and after it became obvious that no action would be taken by DOE to recover monies fraudulently obtained by the respondents from the government, petitioner brought these *qui tam* actions on behalf of the United States under the FCA.[1]

In the Chevron litigation, petitioner's amended complaint alleged that respondents violated the FCA by defrauding the government in their management and operation of the government's petroleum reserves and wet gas processing plants at the Naval Petroleum Reserve No. 1, in Elk Hills, California. The amount of false and fraudulent claims was alleged to total more than $17 million. Petitioner acquired the information upon which he based his amended complaint during the course of his OIG employment. Through petitioner's efforts, this information was publicly disclosed in government reports. Because the information had been publicly disclosed, petitioner was required under the FCA to demonstrate

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[1] The actions were brought after petitioner retired from government service. He also brought *qui tam* actions against other government contractors, but those cases are not at issue here.

that he was an "original source" of the information upon which his allegations of fraud were based in order to avoid the jurisdictional bar against FCA cases based on publicly disclosed information.

In the University of California litigation, petitioner alleged that respondents violated the FCA by defrauding the government in the performance of contracts for the management and operation of the Los Alamos National Laboratory in Los Alamos, New Mexico and the Livermore National Laboratory in Livermore, California. The amount of false and fraudulent claims was alleged to total more than $175 million. Petitioner acquired the information upon which he based his allegations both during the course of his OIG employment and after his employment with the OIG had ceased. As in the Chevron litigation, through petitioner's efforts, some of this same information was publicly disclosed in government reports. Thus, petitioner was again required under the FCA to demonstrate that he was an "original source" of the information upon which his allegations of fraud were based in order to avoid the jurisdictional bar against FCA cases based on publicly disclosed information.

In both cases, respondents and the United States argued below that the district court lacked subject matter jurisdiction over petitioner's *qui tam* actions because current or former government investigators may not maintain such actions at all and, at the very least, former government investigators could not as a matter of law meet the requirements necessary to be an "original source" as that term is defined in the FCA. The district court granted the motions to dismiss in both cases.

Following consolidation of the two appeals, a unanimous panel of the Ninth Circuit reversed the district court's dismissals. The panel expressly held that: (1) nothing in the FCA precluded a government employee, including an employee of the OIG such as petitioner, from instituting and prosecuting a *qui tam* action based upon information he had acquired during the course of his employment; (2) nothing in the FCA precluded petitioner from meeting the requirements necessary to qualify as an "original source"; (3) permitting petitioner to proceed with his *qui tam* actions did not result in any conflict with the Inspector General Act, 5 U.S.C. App. 3; and (4) under the facts alleged in his complaints, petitioner met all criteria required to establish his status as an "original source."[2]

The Ninth Circuit, sitting *en banc*, vacated the panel decision and affirmed the district court's dismissals of petitioner's *qui tam* actions for lack of subject matter jurisdiction. There were five separate opinions including a dissenting opinion by the two members of the *en banc* court who were on the original panel. The *en banc* majority based its reversal solely on its holding that because petitioner "was a salaried government employee compelled to disclose fraud by the very terms of his employment" (p. 9a, *infra*), he could not as a matter of law meet that part of the "original source" test which required him to show that prior to bringing his cases, he had "voluntarily" disclosed to the government the information upon

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[2] The panel also concluded that the eleventh amendment was no bar to a *qui tam* action against The University of California. (p. 42a, *infra*).

which his fraud allegations were based. In support of its holding, the *en banc* majority relied on one of many definitions of "voluntary" found in Webster's Third New International Dictionary and what the *en banc* majority denoted as a "common-sense" reading of the FCA. (p. 10a, *infra*).[3] However, in reaching its decision regarding the construction and meaning of the term "voluntary," the *en banc* majority ignored or discounted clear legislative and judicial pronouncements including a contrary opinion by the Eleventh Circuit; the unequivocal statement defining the term "voluntary" by Senator Charles Grassley, the principal sponsor of the 1986 amendments to the FCA[4]; the unanimous panel decision; and the events leading to enactment of the 1986 amendments to the FCA, all of which supported petitioner's position that he was entitled to proceed as an "original source." Moreover, the *en banc* majority recognized the tension its decision had created with its own prior holding in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), in which the Ninth Circuit had implicitly held that nothing in the FCA precludes a federal employee from prosecuting a *qui tam* action based upon information he acquired during the course

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[3] In a concurring opinion joined by Judge T. G. Nelson, Judge Kozinski observed that other dictionary definitions of the word "voluntary" supported the dissent's view that petitioner could meet the "original source" test. (p. 18a, *infra*).

[4] The "original source" qualification first became part of the FCA by virtue of the 1986 amendments. (p. 37a, *infra*).

and scope of his federal employment. *Id.* at 1419-20. The *en banc* majority noted that:

> Fine next argues that we *must* construe his disclosures to be voluntary, because every federal employee labors under a duty to report fraud against the government, and we certainly cannot mean to establish a rule that would bar all federal employees from the universe of potential "original sources". He directs us to a 1989 Executive Order entitled "Principles of Ethical Conduct for Government Officers and Employees." This order establishes that "[e]mployees shall disclose waste, fraud, abuse and corruption to appropriate authorities." Exec. Order No. 12,674, 54 Fed. Reg. 15,159 at § 101(k) (1989). We need not decide the legal import of this order as a general matter, because the fact that Fine was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary.

(pp. 11a-12a, *infra*) (footnote omitted).

Unlike the *en banc* majority, the unanimous panel decision correctly recognized: that "[a]ll government employees are under an obligation to disclose fraud they discover in the course of their employment;"[5] that prior

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[5] The duty of federal employees to report fraud does not rest solely on Executive Order No. 12,674. *See Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives Concerning the Qui Tam Provisions of the False Claims Act and H.R. 4563*

to 1986, government employees were not doing so; and that the 1986 amendments were enacted to encourage government employees to "speak up and take action" by enlarging the universe of potential *qui tam* relators to include government employees. (p. 40a, *infra*). Disregarding this Congressional intent, the *en banc* majority's holding that an OIG employee may never serve as "original source," construes the FCA in a fashion that obviously and erroneously discourages government employees from disclosing the fraud they discover.

Because every Court of Appeals that has addressed the issue has found that government employees are not barred as a matter of law from prosecuting *qui tam* actions pursuant to the FCA, the *en banc* majority's holding that the requirement of "voluntary" disclosure can never be satisfied where there exists a specific duty on the part of the government employee to report fraud is contrary to the very purpose of the 1986 amendments. As the *en banc* dissent stated:

> To encourage qui tam actions, Congress removed a broad jurisdictional bar and set forth a more specific and less restrictive set of jurisdictional bars. 31 U.S.C. § 3730(e). These

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(April 1, 1992) (pp. 60a-61a, *infra*). Mr. Gerson, on behalf of the United States Department of Justice, stated: "Every government employee has a duty to his employer to report what he knows about fraud. . . . The duty to report is set out in numerous executive orders, federal regulations, and policy segments, and is a fundamental part of the common law of agency." (p. 61a, *infra*).

"[e]xclusions of federal jurisdiction, set out in the 1986 amendments to the False Claims Act, are unusually precise." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). "A straightforward reading of the 1986 False Claims Act reveals that Congress did not explicitly exclude government employees from the class of proper qui tam relators." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1503 (11th Cir. 1991); *accord Hagood*, 929 F.2d at 1420. Neither did Congress explicitly exclude Inspector General employees. Why would Congress? Why would the Government be less willing to take dollars recovered by an Inspector General employee than by any other government employee or by any other person?

* * *

The majority's interpretation of the term "voluntarily" is not a reasonable one because it assumes–unnecessarily–that Congress chose a most unlikely and unduly complicated way to achieve a very simple objective. The majority does not explain why Congress did not simply say that some or all government employees are barred from filing qui tam actions, if that was its intent, instead of creating an implicit bar through the requirement that a disclosure be made "voluntarily."

(p. 26a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Absolute Ban on an OIG Employee's Qualifying as an "Original Source" Is Wrong and Conflicts with the Opinions of the United States Court of Appeals for the Eleventh Circuit and Numerous District Courts.

The *en banc* majority's holding that, because petitioner was under a duty to report fraud by virtue of his employment, he could not ever qualify as an "original source" under the FCA is in direct conflict with the opinion of the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). The Eleventh Circuit expressly recognized that government employees can serve as *qui tam* relators if they are an "original source" of publicly disclosed information upon which their complaints are based. In concluding that nothing in 31 U.S.C. § 3730(e)(4)(A) precludes a government employee from serving as an "original source", the Eleventh Circuit stated:

> While we decline to enter into an analysis of the "original source" exception to section 3730(e)(4)(A)'s jurisdictional bar, this finding implicitly rejects the United States's assertion that "a government employee who brings an action based upon information he learns within the scope of his government duties can *never*

> qualify as an 'original source.' " Brief for United States at 48 (emphasis in original). Such an assertion is simply incompatible with our holding that government employees are not barred from bringing *qui tam* actions based upon information acquired in the course of their government employment.

United States ex rel. Williams, 931 F.2d at 1501 n.14. *See United States v. Enriquez*, No. 90-6105-CIV-PAINE, 1991 WL 236502, at *5 (S.D.Fla. July 12, 1991) (holding an OIG investigator to be an "original source"); *see also United States ex rel. Fine v. MK-Ferguson Co.*, 861 F.Supp. 1544, 1548, 1553-54 (D.N.M. 1994) (holding that while an OIG employee may prosecute a *qui tam* action he was not an "original source" on the facts of the case); *United States v. Stern*, 818 F.Supp. 1521 (M.D.Fla. 1993) (allowing former OIG investigator to recover statutory award in a *qui tam* case based on publicly disclosed indictment). *But see United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 18, 20 (1st Cir. 1990) (holding that a government employee may serve as *qui tam* relator but stating in dictum that he is precluded from serving as an "original source").

The *en banc* majority's seizure upon the term "voluntary" to preclude a government employee such as petitioner from ever serving as an "original source" not only conflicts with the Eleventh Circuit's approach, but also flies in the face of the legislative history of the 1986 amendments of the FCA. As the *en banc* dissent correctly noted:

> It is quite clear why Congress included the "voluntarily" language in the statute. Senator Grassley, the principle sponsor of the 1986 amendments to the False Claims Act, explained the reason on the floor of the Senate. He stated

> that the purpose was to prevent qui tam actions by a person who is a "source of the allegations only because the individual was subpoenaed to come forward." 132 Cong. Rec. 20,536 (1986). Senator Grassley's remarks provide the only reasonable interpretation of the meaning of the word "voluntarily."

(p. 26a, *infra*). The *en banc* majority did not ignore Senator Grassley's explanation; it simply chose to marginalize its import by deeming it "a single floor statement." (p. 11a, *infra*). The statements of Senator Grassley are, however, definitive. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) (relying on statements of Senator Grassley for interpretation of the "original source" requirement).

The unanimous panel opinion vacated by the *en banc* majority properly held that petitioner had voluntarily disclosed the information upon which he based his *qui tam* lawsuits. In reaching its conclusion, the panel correctly analyzed the legislative history of the 1986 amendments to the FCA. The panel noted that a significant reason for Congress's enactment of the 1986 amendments was to respond to its findings that federal employees were involved in a "conspiracy of silence" whereby they failed to report fraud because they felt "nothing would be done to correct the activity even if reported. . . . " (p. 40a, *infra*). The panel therefore held:

> It would be incongruous for us, therefore, to read the "voluntary disclosure" requirement to bar a government employee who has gone to his supervisors to report fraud from bringing a *qui tam* action.

(p. 40a, *infra*). The holding by the *en banc* majority that petitioner could never be an "original source" turns logic on its head. Under the *en banc* majority's holding, government employees such as petitioner would be encouraged to race to the courthouse the instant they suspect fraud against the government so as to avoid the risk of public disclosure of their information rather than, like petitioner, voluntarily bringing their findings to their supervisors (or any other government officials who might listen) in an attempt to have the government take action. Thus, the *en banc* majority's dictionary analysis of the "voluntary" disclosure required to be an "original source" results in a construction of the FCA that discourages rather than encourages government employees from internally reporting fraud they discover in the course of their employment. As such, the *en banc* majority's construction of "original source" is totally inconsistent with Congressional intent in enacting the 1986 amendments.

Moreover, in reaching its conclusion, the *en banc* majority ignored additional legislative history that supports the panel's decision and the Eleventh Circuit's approach. The 1986 amendments were a direct response to *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which the Seventh Circuit had held that Wisconsin was barred as a *qui tam* relator because, prior to bringing its *qui tam* case, the state had disclosed its information to the government pursuant to a federal regulation requiring it to do so. *Id.* at 1103, 1106. Congress's reaction was swift and focused. As the Ninth Circuit noted in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992):

> This restrictive interpretation [of the Seventh Circuit in *Dean*] was too much for Congress. In part, the 1986 amendments to the Act

> were "aimed at correcting restrictive [court] interpretations of the act's . . . *qui tam* jurisdiction" provisions. *Senate Report*, at 4, 1986 U.S.C.C.A.N. 5269. The 1986 amendments to *qui tam* jurisdiction were remedial, not innovative. Congress wanted in 1986 what it apparently thought it had in 1943: a law requiring that the relator be the original source of the *government's* information. Seeking only to "correct" opinions like *Dean*, Congress permitted one who publicly disclosed the information to bring a *qui tam* suit.

Id. at 1419. The Senate Report for the 1986 amendments to the FCA evidences Congressional awareness of the *Dean* decision and the surrounding problems concerning the jurisdictional bar contained in the 1943 amendments. *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716 F.Supp. 908, 917-18 (E.D. Va. 1989). What concerned Congress and what Congress corrected when it enacted the 1986 amendments was the inability of persons to prosecute *qui tam* actions based on information they were required by law to disclose to the government. Yet the *en banc* majority completely ignores this legislative history in order to address policy concerns of its own.

It is clear from the *en banc* majority opinion that the decision to preclude petitioner as a matter of law from serving as an "original source" was driven far more by policy considerations than by a careful analysis of the actual intent of Congress in enacting the 1986 amendments. The *en banc* majority candidly acknowledges its

motivation for construing the "original source" provision as it does:

> Our conclusion that Fine is not an original source may leave the underlying instances of alleged fraud unpoliced and unpunished so far as the False Claims Act is concerned. Our concern over this state of affairs is eased a bit, however, by the Government's predictions regarding the result of a contrary ruling.

(p. 12a, *infra*). The *en banc* majority then quotes at length the government's predictions of a "chamber of horrors" if petitioner and other federal investigators are permitted to prosecute *qui tam* actions under the FCA. (pp. 12a-13a, *infra*).[6]

The government's predictions and hypothetical concerns lack any empirical substantiation. In the years following the enactment of the 1986 amendments, there have been no reported instances of employees engaging in the type of behavior the government speculates may

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[6] The government's dire predictions do not distinguish between: (a) allowing a government investigator to prosecute a *qui tam* action based upon publicly disclosed information (where the employee must establish his "original source" status); and (b) allowing the investigator to prosecute a *qui tam* action on the basis of information that has not been publicly disclosed. Yet the cases are unanimous in holding that there is no bar *per se* to government investigators' pursuing *qui tam* actions in the latter case. *See United States ex rel. Williams*, 931 F.2d at 1499; *United States ex rel. LeBlanc*, 913 F.2d at 20; *MK-Ferguson Co.*, 861 F.Supp. at 1546 (D.N.M. 1994); *Enriquez*, 1991 WL 236502, at *3; *United States v. CAC-Ramsey, Inc.*, 744 F.Supp. 1158, 1161 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992).

occur. Rather OIG employees and other federal investigators have demonstrated themselves to be highly professional and loyal government employees. The point is illustrated by *United States v. CAC-Ramsey, Inc.*, 744 F.Supp. 1158 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992). In rejecting the government's assertion that a *qui tam* relator was not entitled to recover because he was a former OIG auditor who based his action upon "expropriated" government work product, the district court stated:

> Ultimately, what appears to have happened in this case is, after seeing no effective action taken by the government, relators filed the suit. This appears to be exactly what Congress intended, regardless of whether the relator is a government employee or not.

Id. at 1160. The complete absence of any reported instance of an OIG or other federal investigator or employee abusing his or her professional responsibilities in order to bring a *qui tam* action further demonstrates that there is no realistic basis for the government's concerns to which the *en banc* majority paid homage. Yet, even were there to be any validity whatsoever to any of the government's concerns, the *en banc* majority should have directed the government to present its policy arguments and its dire warnings and predictions to the appropriate forum, *i.e.*, Congress, rather than force a construction of the FCA that was never intended and contravenes the correct interpretation of "original source" found by the panel and the Eleventh Circuit. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *accord Addison v. Holly Hall Fruit Prods.*, 322 U.S. 607, 617-18 (1944). In *Hess*, this Court

rejected similar policy arguments advanced by the government and held:

> The government presses upon us strong arguments of policy against a statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than what it did . . . But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed but the statute has not.

Hess, 317 U.S. at 546-47. Following this Court's pronouncement in *Hess*, the issues were presented to the proper forum, and Congress adopted the 1943 amendments to the FCA. The government's objections on the basis of policy and hypothetical concerns regarding the effect of construing the 1986 amendments to permit *qui tam* actions by government employees were similarly deemed misdirected to the courts. *United States ex rel. Williams*, 931 F.2d at 1503-4. In fact, the government has recognized that Congress is the appropriate forum to address its concerns about the 1986 amendments. However, the government's recent efforts to have Congress amend the FCA to put special restrictions on federal employees who bring *qui tam* actions have been unsuccessful. *See DOJ Alert, In Brief: Qui Tam Reform Dropped*, February 20, 1995, p. 1 (p. 62a, *infra*). In short, when presented with the government's "chamber of horrors," Congress refused to disturb the language of the 1986 amendments, the clear Congressional intent of which compels the construction of the terms "voluntary" and "original source" afforded them by the unanimous Ninth Circuit panel that first decided these consolidated cases.

II.

The Decision Below That Petitioner Is Precluded as a Matter of Law from Serving as an "Original Source" Raises Important and Unresolved Issues.

The issue of whether a government investigator may serve as an "original source" and the broader issue of whether government employees are precluded from serving as *qui tam* relators at all have now been addressed by four Courts of Appeals with inconsistent and irresolute results.[7] It is undisputed that the *qui tam* provisions of the FCA have become an important weapon in the war against government fraud. As Senator Grassley noted:

> This unique mechanism for fighting fraud, the qui tam lawsuit, has been employed in Anglo-American law since the middle ages to help the Government protect its interests. Just last year, a quarter-billion dollars was recovered in qui tam lawsuits. That doubled the total recoveries in the past 6 years to nearly a half-billion. The taxpayers now recover more money through qui tam lawsuits than they do through fraud lawsuits initiated by the Justice Department.

139 CONG. REC. S5179 (daily ed. Apr. 29, 1993) (statement of Senator Grassley).

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[7] *See* p. 1a, *infra*; *United States ex rel. Williams*, 931 F.2d at 1493; *United States ex rel. LeBlanc*, 913 F.2d at 17; *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 570 & n.3 (10th Cir. 1995) (noting in *dicta* that the district court held that "Mr. Fine's former employment with the DOE Inspector General did not preclude him from filing a *qui tam* action"); *see also CAC-Ramsey*, 744 F.Supp. 1158, *aff'd*, 963 F.2d 384 (11th Cir. 1992).

Because of the importance of the FCA, the need for uniformity in its enforcement is paramount. That the issues raised by these consolidated cases transcend the interests of the parties is demonstrated by the fact that the government has appeared as an *amicus curiae* at every stage of these two civil actions and felt the need to seek and secure leave to orally argue the issues before the *en banc* panel below. The government's hostility to federal employees participating in *qui tam* litigation is well documented. As Senator Grassley put it:

> The Justice Department in the past has exhibited a hostility to whistleblower lawsuits, but Attorney General Reno has pledged to reexamine the Department's policy on qui tam.

139 CONG. REC. S5179 (daily ed. Apr. 29, 1993) (statement of Senator Grassley). Judicial pronouncements are even more explicit. *See, e.g., United States ex rel. Williams,* 931 F.2d at 1503-04 (refusing to engage in judicial legislation to amend the FCA to prohibit government employees from being *qui tam* relators in order to ameliorate concerns of the United States); *Stern,* 818 F.Supp. at 1522-23 (denying government's attempts to impose constructive trust on proceeds to which former OIG employee would otherwise be entitled as a result of successful resolution of employee's *qui tam* case); *CAC-Ramsey,* 744 F.Supp. at 1159-1161 (allowing retired OIG investigator to recover percentage of award over the government's repeated objections); *Enriquez,* 1991 WL 236502, at *5 (denying government's request to prevent OIG investigator from remaining as party to *qui tam* suit).

CONCLUSION

After repeated futile efforts to address internally the fraud alleged in these consolidated appeals, petitioner brought these *qui tam* actions on behalf of the United States under the FCA. As the district court stated in *CAC-Ramsey:* "This appears to be exactly what Congress intended, regardless of whether the [*qui tam*] relator is a government employee or not." 744 F.Supp. at 1160. The *en banc* majority's decision does violence to the expressed purpose of Congress to enlarge the class of *qui tam* relators and to reinvigorate the war on government fraud. A writ of certiorari should be granted to address this unwarranted nullification of the right of government employees to participate in that war through the FCA.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA EX REL., *Plaintiff,* HAROLD R. FINE, *Plaintiff-Appellant,* v. CHEVRON, U.S.A., INC.; BECHTEL PETROLEUM OPERATIONS, INC.; and WILLIAMS BROTHERS ENGINEERING COMPANY, *Defendants-Appellees.*	No. 93-15012 D.C. No. CV-91-03224-RHS

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, Senior District Judge, Presiding

UNITED STATES OF AMERICA EX REL., *Plaintiff,* HAROLD R. FINE, *Plaintiff-Appellant,* v. THE UNIVERSITY OF CALIFORNIA, and THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Defendants-Appellees.*	No. 93-15728 D.C. No. CV-91-03608-FMS OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
August 31, 1995 – San Francisco, California

Filed December 12, 1995

Before: J. Clifford Wallace, Chief Judge, Stephen Reinhardt, Robert R. Beezer, Cynthia Holcomb Hall, Alex Kozinski, Edward Leavy, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, Andrew J. Kleinfeld, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hall

Separate concurrence by Judge Kozinski in which Judge T. G. Nelson joins; separate concurrence by Judge Trott in which Judge Kozinski joins; separate concurrence by Judge Hawkins in which Judge Kozinski joins; dissent by Judge Leavy in which Judge Reinhardt joins.

COUNSEL

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OPINION

HALL, Circuit Judge:

This is a consolidated appeal from the dismissal of two qui tam actions under the False Claims Act. The relator, Harold Fine, is a former employee of the Office of the Inspector General at the U.S. Department of Energy. He left his job and filed these, and several other, qui tam actions. Fine concedes that his actions are based upon publicly disclosed allegations and that he therefore cannot maintain the actions unless he qualifies as an "original source."

The district court, in separate orders, dismissed both actions for lack of subject matter jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On appeal by the defendants, a panel of this Court reversed and

remanded.[1] A majority of the nonrecused active judges then voted to rehear the case en banc.

We now affirm both dismissals because we conclude that Fine cannot be an "original source." To qualify as an original source, one must *voluntarily* provide the information forming the basis of the claim to the government prior to filing suit. Fine *did* provide the information underlying his claims to the government prior to filing suit. He did so, however, as a part of his job responsibilities. We hold that his provision of this information to his employer – the government – was not voluntary within the meaning of the False Claims Act; he therefore is not an original source.

I.

Harold Fine worked for almost ten years as the Assistant Manager of the Western Region Audit Office for the Office of Audits of the Office of the Inspector General at the U.S. Department of Energy. His job required him to supervise audits that other employees had conducted, and edit audit reports that others had written. During his last four years on the job, between eighty-four and ninety-seven percent of the audit reports from the Western Region Audit Office came from employees under his supervision.

He left the job in 1992, apparently disgruntled because his supervisors either could not or would not take action against every perceived violation he brought

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[1] The panel opinion, which we hereby vacate, was reported at 39 F.3d 957 (9th Cir. 1994).

to their attention. During the year following his retirement, Fine filed a total of seven qui tam actions under the False Claims Act, two of which are at issue here.[2] Two months after his retirement, he brought one action "on behalf of the United States" against Chevron, U.S.A., et al. One month later, he filed suit against the University of California and its Board of Regents.

After the government declined to intervene, the complaints were unsealed and served on the defendants. Discovery progressed apace until the defendants in both cases moved to dismiss. The district court granted both motions, concluding orally in the case against Chevron that "it makes no sense" to permit Fine to bring a qui tam action. In the case against the University of California, the court issued a published opinion, *United States ex rel. Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993). This ruling dismissed the case against the University of California because "Mr. Fine was not an 'original source' and [Inspector General] auditors should be barred from bringing *qui tam* actions arising from [Inspector General] audits." *Id.* at 1357. We review these dismissals for lack of subject matter jurisdiction de novo. *United*

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[2] Fine also has filed actions against his former employer seeking documents under the Freedom of Information Act. *See Fine v. United States Dep't of Energy*, 823 F. Supp. 888 (D.N.M. 1993) (24-page opinion disposing of Fine's document requests relating to alleged fraud by the accounting firm Peat, Marwick); *Fine v. United States Dep't of Energy*, 830 F. Supp. 570 (D.N.M. 1993) (ruling on various motions involving Fine's FOIA requests). Presumably, Fine is seeking documentation to support currently pending or yet-to-be-filed qui tam actions.

States ex rel. Schumer v. Hughes Aircraft Co., No. 92-55759, slip op. 10401, 10409 (9th Cir. Aug. 22, 1995).

II.

Numerous of this and other courts' opinions have rehearsed the history and purposes of the False Claims Act and its qui tam provisions. *See, e.g., United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 812-13 (9th Cir. 1995); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1418-20 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991). These cases support our observation that the paradigm qui tam case is one in which an insider at a private company brings an action against his own employer. In *Wang*, for instance, we noted that "[t]he paradigm *qui tam* plaintiff is the 'whistleblowing insider.' *Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime." *Wang*, 975 F.2d at 1419 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991)); *see, e.g., Schumer*, No. 92-5759, slip op. 10401 (9th Cir. Aug. 22, 1995) (qui tam action brought by former manager at Hughes Aircraft Company); *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995) (qui tam action brought by former employee of Northrop Corporation).

Legislative history also suggests that Congress envisioned only this paradigm suit when enacting the current version of the qui tam provisions. The Senate Report to the 1986 Amendments to the False Claims Act, for instance, states that "[t]he Committee's overall intent in

amending the *qui tam* section of the False Claims Act is to encourage more *private* enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986) (emphasis added). Similarly, the House Report emphasizes that "[t]he purpose of the *qui tam* provisions of the False Claims Act is to encourage *private individuals* who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. Rep. 660, 99th Cong., 2d Sess. 23 (1986) (emphasis added).

This case, in which a *government* employee, who bore as the "paramount responsibility of his position" the duty to disclose fraud to his supervisors, *Fine*, 821 F.Supp. at 1360, defies the paradigm. That this case involves application of a statute to a factual scenario Congress may never have envisioned should not give us too much pause, however. The terms of the jurisdictional provisions governing this case are, after all, "unusually precise." *Hagood*, 929 F.2d at 1419. Our analysis of whether the district court had jurisdiction to hear Fine's claims therefore begins with the "precise" language of the statute.

III.

The False Claims Act provides:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or

> the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A)-(B).

The parties in this case agree that Fine's actions are based upon publicly disclosed allegations. Section 5 of the Inspector General Act of 1978 requires Inspectors General to prepare semiannual reports summarizing the activities of their offices and to furnish those reports to agency heads, Congress, and the public. *See* 5 U.S.C. app. 2, § 5. Fine concedes that he based his claims on reports he furnished to his superiors, the contents of which were properly disclosed to the public under the terms of the Inspector General Act. Thus, Fine can maintain this action only if he qualifies as an original source of the information, and we limit our discussion and holding to this question.

The statute provides that a relator seeking to avoid the bar against suits based on public disclosures must show both that he has "direct and independent knowledge of the information on which the allegations are based," and that he "has voluntarily provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4)(B). At least two courts have addressed whether an auditor for the Office of the Inspector General can have "direct and independent knowledge." *See United*

States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (reasoning that the "fruits of [the auditor's] effort belong to his employer," so he could not have "independent knowledge" of the information); *United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1544, 1554 (D.N.M. 1994) (holding that Harold Fine did not have direct and independent knowledge because he did not personally conduct the audits that led to the public disclosures).

Only the district court in this case, however, has addressed whether an employee of the Office of the Inspector General can meet the other part of the original source test, i.e., whether he can be deemed to have provided information to the government "voluntarily." It concluded that Fine's actions "cannot be construed as 'voluntary' [because they] were compelled by the nature of his employment." *Fine*, 821 F. Supp. at 1360. The court's holding rested on its finding that disclosing fraud was "the paramount responsibility of [Fine's] position." *Id.* Because we agree with the district court regarding the second part of the original source requirement, we need not discuss whether Fine's knowledge was direct and independent.

The district court is surely correct in its conclusion that Fine was no volunteer. He was a salaried government employee, compelled to disclose fraud by the very terms of his employment.[3] He no more voluntarily provided information to the government than we, as federal

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[3] Recall, in this light, that the False Claims Act provides a statutory fine of between $5,000 and $10,000 for every false claim submitted to the government, as well as triple compensatory damages. The relator is entitled to share in as

judges, voluntarily hear arguments and draft dispositions. *Cf. LeBlanc*, 913 F.2d at 20 (noting that a relator employed as a Quality Assurance Specialist for the United States Government Defenses Contract Administrative Service had the duty to uncover fraud as a condition of his employment).

Dictionary definitions of "voluntary" support this common-sense reading.[4] Webster's Third, for example, provides the following definition:

> Acting, or done, of one's own free will without valuable consideration; acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs.

Webster's Third New International Dictionary 2564 (1981) (definition 1(g)). Fine, by contrast, acted in exchange for

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much as 30% of the settlement or judgment depending on whether the United States intervenes in the action. Thus, potential recoveries for qui tam relators are staggeringly large, as well they should be for insiders in private companies who risk their jobs and reputations when they blow the whistle on their own employers. We question whether government auditors, who already receive a salary and benefits for reporting allegations of fraud, deserve or need this same incentive.

[4] We have in the past relied on common-sense definitions to parse the terms of the qui tam provisions. In *Hagood*, for instance, we rejected in dicta the Government's proposal that "public disclosure" occurs when "a government employee 'disclosed' to himself as a member of the public the information on which he based his suit." *Hagood*, 929 F.2d at 1419. We labelled the proposition "too metaphysical a contention for the interpretation of a plain congressional enactment." *Id.* We similarly decline today to embark on a philosophical inquiry into the meaning of "voluntary."

valuable consideration – his salary – and under an employment-related obligation to do the very acts he claims were voluntary.

Fine nonetheless asserts that his provision of information was voluntary under the terms of the statute, and that, under the False Claims Act, the provision of information to the government is always voluntary unless compelled by subpoena. In support, he cites a single floor statement by Senator Grassley, the principal sponsor of the 1986 amendments, who stated that the voluntary disclosure requirement was intended to protect against actions in which the relator "was a source of the allegations only because the individual was subpoenaed to come forward." 132 Cong. Rec. 20,536 (1986).

This statement does not require us to conclude that Fine's provision of information was voluntary within the meaning of the False Claims Act. On its face, Senator Grassley's statement does not purport to describe the *only* situation in which the voluntary disclosure requirement would bar a qui tam suit following a public disclosure. Moreover, a single floor statement could not convince us to adopt so tortured a construction of a commonly understood word. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). We therefore decline to adopt Fine's proposed narrow construction of the voluntary provision requirement.

Fine next argues that we *must* construe his disclosures to be voluntary, because every federal employee labors under a duty to report fraud against the government, and we certainly cannot mean to establish a rule

that would bar all federal employees from the universe of potential original sources.[5] He directs us to a 1989 Executive Order entitled "Principles of Ethical Conduct for Government Officers and Employees." This order establishes that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." Exec. Order No. 12,674, 54 Fed. Reg. 15,159, at § 101(k) (1989). We need not decide the legal import of this order as a general matter, because the fact that Fine was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary.

IV.

Our conclusion that Fine is not an original source may leave the underlying instances of alleged fraud unpoliced and unpunished so far as the False Claims Act is concerned. Our concern over this state of affairs is eased a bit, however, by the Government's predictions regarding the result of a contrary ruling. The United States warns that employees of the Office of the Inspector General would have the following perverse incentives:

> [T]o spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal

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[5] In *Hagood*, 929 F.2d 1416, we implicitly accepted the proposition that a federal employee may bring a qui tam action. We have never addressed, however, whether federal employees might be excluded as a class from qualifying as original sources. We leave this question as well, for another day.

> gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests. Contractors will be deterred from cooperating with Inspector General investigations and audits because they fear, legitimately, that their confidential work papers will be appropriated by Inspector General employees for their personal use in filing qui tam actions, rather than for legitimate governmental functions. Criminal prosecutions will be seriously compromised, since IG employees are often the government's prime witnesses in criminal and civil fraud cases, and their personal interest in the outcome of their audits and investigations will make their testimony highly impeachable. Public confidence in the integrity and impartiality of government audits and investigations will necessarily decrease.

Amicus Brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9 (footnotes omitted).

The government's urgings convince us that our reading of the statute – albeit against an unanticipated factual background – is a sensible one. The government employed Fine to assist in its efforts to root out, disclose, and prevent fraud, and rewarded him with a salary and

benefits. The government has no further need to rouse him from slumber and embolden him to perform his job responsibilities through the possibility of an enormous monetary recovery from a qui tam action. His performance of his job responsibilities, including the provision to his superiors of the information that later formed the basis of these two suits, was not voluntary within the meaning of the False Claims Act. He therefore is not an original source. Because both of his actions are based on publicly disclosed allegations or transactions, and because Fine was not an original source, we affirm the district court's dismissal of both suits.

THE PANEL OPINION IS VACATED; THE DISTRICT COURT'S JUDGMENT IS AFFIRMED.

KOZINSKI, Circuit Judge, with whom Judge T.G. Nelson joins, concurring:

I write briefly to comment on the linguistic issue raised by Judge Leavy's dissent. The majority holds that, for purposes of the False Claims Act, an individual does not act voluntarily if he is legally obligated to take a particular action. In Judge Leavy's view, an individual can act voluntarily even if he is legally required to do so. Neither view is implausible: Webster's New International Dictionary (second edition, of course) gives no fewer than eight definitions for "voluntary." Some are consistent with Judge Leavy's sense: "1. Proceeding from the will, or from one's choice or full consent; produced in or by an act of choice. . . . 4. Of or pertaining to the will; subject to, or regulated by the will. . . . " *Id.* at 2858. Others support

the majority: "2. Unconstrained by interference; unimpelled by another's influence. . . . 8. *Law.* Acting, or done, of one's own free will, without valuable consideration; acting, or done, without any present legal obligation to do the thing done, or any such obligation that can accrue from the existing state of affairs. . . . " *Id.*

This is not unusual; courts often construe terms with more than one nuance of meaning. In *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 413-21 (1819), to cite a famous example, the Supreme Court grappled with the "sense" in which the word "necessary" is used in the Necessary and Proper Clause, U.S. Const. art. I, § 8 ("Congress shall have the power . . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). The word "necessary," Maryland argued, "limit[ed Congress's] right to pass laws . . . to such as are indispensable, and without which the [enumerated] power[s] would be nugatory." *Id.* at 413. The Court avoided this linguistic trap: It noted that the word "has not a fixed character, peculiar to itself. It admits of all degrees of comparison. . . . A thing may be necessary, very necessary, absolutely or indispensably necessary." *Id.* at 414. Many laws Congress might pass pursuant to an enumerated power may be "essential to the beneficial exercise of the power, but not indispensably necessary to its existence." *Id.* at 415. Maryland's "narrow construction" would have a "baneful influence . . . on all the operations of the government . . . rendering [it] incompetent to its great objects." *Id.* at 417-18. The Court therefore rejected

this "narrow construction" and held that "necessary" means, "plainly adapted to [the legislative] end." *Id.* at 421.

Here too, we are proffered a narrow construction of the term "voluntary," as reflected in Judge Leavy's dissent. But what are the consequences of adopting this construction? Under Judge Leavy's view, *any* action can be voluntary, even if the actor is subject to severe compulsion: When I hand my money to the armed man in the alley, my action is voluntary if I make an independent decision to do so (perhaps as an act of charity). Under this construction, voluntariness turns on the actor's state of mind: If he would have disclosed fraud to the government regardless of his legal obligation to do so, his action is voluntary; if he disclosed the fraud only because he was required to do so, it's not.

There are good reasons to reject this interpretation of "voluntary." First, it would be highly unusual to have a federal court's subject matter jurisdiction hinge on what's going on in someone's head, without any possibility of objective verification. So construed, the voluntariness requirement would be reduced to a formality, as it would be nearly impossible to refute a relator's assertion that he acted voluntarily, despite whatever legal or moral compulsion he might have been subject to.

Perhaps more important, the interpretation of "voluntary" embraced by Judge Leavy does nothing at all to further the purposes of the 1986 Amendments to the False Claims Act. The Amendments, as I read them, were designed to give incentives for disclosure to individuals who otherwise would have no reason to disclose and who

might, in fact, suffer as a result. The Amendments surely weren't designed to force the government to pay for information to which it's already entitled. *See United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied sub nom., LeBlanc v. United States*, 499 U.S. 921 (1991). Yet that is what Judge Leavy's interpretation of the term would do, by forcing the government to pay Mr. Fine for information it owns.

IG employees are, in fact, precisely the kind of people who should be excluded from bringing *qui tam* suits under the 1986 Amendments. The government pays salaries calculated to reward them for finding and turning over information about waste, fraud and abuse; it holds out the threat of discipline for failure to fulfill these duties; it imposes criminal sanctions for misusing or suppressing information obtained as part of an investigation. At the same time, IG employees are not subject to the types of pressures to withhold information that might burden employees of private companies, or other government employees. These other employees might well be risking their careers by coming forward with information about their superiors; IG employees are insulated from the agency's chain of command. *See* 5 U.S.C.A. app. 3 §§ 2,3(a),(b). Thus, it makes no sense at all to give IG employees additional incentives to come forward with information.

Were there no plausible interpretation of the term "voluntary" that would exclude IG employees, I might feel constrained to agree with the dissent. But, given that one of the dictionary definitions of "voluntary" is "acting without any present legal obligation," Judge Leavy is

surely mistaken when he claims that the majority adopts "a contorted view of voluntariness." Dissent at 15506.

I don't dispute that Judge Leavy's definition of "voluntary" is also legitimate. But I can't agree with his implicit assumption that this is the only legitimate construction of the term, or the right one for this statute. Because the majority's construction of "voluntary" falls comfortably within the range of meanings to which the term is susceptible, and because it is consistent with the purposes of the 1986 Amendments to the False Claims Act, I am pleased to join Judge Hall's majority opinion.

TROTT, Circuit Judge, concurring in the result:

Although I concur in the result reached by the majority, I arrive at that destination by a different analytical route, one that does not depend on the meaning in the statute of the word "voluntary."

Judge Hall is on target when she quotes *Wang* for the proposition that "[t]he paradigm *qui tam* plaintiff is the 'whistleblowing insider.' " *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Based on the record, she is also correct when she observes (1) that "[l]egislative history also suggests that Congress envisioned only this paradigm suit when enacting the current version of the *qui tam* provisions," and (2) that this case "defies the paradigm." But she stops here rather than taking the next logical step which is to reject out of hand Mr. Fine's claim that the statute can be abused for a fanciful purpose for which it was never intended.

When the provisions of the *qui tam* statutes are read in conjunction with the complementary provisions of the Inspector General Act, 5 U.S.C. app. 3, 1 et seq., one concludes that Congress could not have contemplated permitting a current or retired Inspector General employee to bring a lawsuit such as this for personal gain. To quote the government's sensible amicus brief, such a lawsuit would give "every government auditor a personal financial stake in matters that he is directed to pursue as part of his federal duties." The idea that Congress would countenance such a result without saying so strikes me as absurd. Why would Congress silently permit auditors like Inspector Fine to use their salaried jobs to set up private lawsuits when such auditors are also subject to a myriad of legal duties and responsibilities, all of which command independence and freedom from personal involvement in their work? Such provisions covering Inspector General employees prohibit the use of public office for private gain, 5 C.F.R. §§ 2635.101(b)(7), 2635.702; the use of government property or government time for personal purposes, 5 C.F.R. §§ 2635.704, 2635.705; the trafficking in "inside information" for personal advantage, 5 C.F.R. §§ 2635.101(b)(3), 2635.703(a); the participation in any government matter in which the employee has a financial interest, 5 C.F.R. §§ 2635.402, 2635.501, 2635.502; and last but not least, the holding of financial interests that may conflict with the impartial performance of government duties, 5 C.F.R. § 2635.403. Government employees aren't even permitted to use "frequent flier miles" for personal use, but they can pursue lucrative *qui tam* lawsuits? All of this makes bizarre Mr.

Fine's claim that he may use this statute to sue people and companies he previously investigated.

To construe the *qui tam* provisions as would the dissent, and as did the original panel, puts such provisions at war with the Inspector General Act when they must be read to complement each other. Permitting auditors to sue literally would destroy the government's anti-fraud and anti-waste programs. The "perverse incentives" outlined by the government and adopted by the majority exceed worrisome. Imagine, for example, an employee of the IRS bringing a *qui tam* lawsuit against a company that the employee had just audited on behalf of the government. Shades of the days leading up to the French Revolution of 1789 when taxes were collected by a private concern called the "Ferme Generale," or "Tax Farm." The first to be guillotined in the Place de la Revolution during the incarnadine Reign of Terror were the hated private tax collectors who made a profit by collecting more from the public than the amount needed by the government.[1] One day, *Inspector* Fine uses the awesome power of the federal government to investigate you; the next, *Mr.* Fine uses the information he pries loose from you with that power to augment his bank account. Can anyone say when Inspector Fine wields the coercive tools of the government that he is also not working for himself? Dr. Jekyll one day, Mr. Hyde the next. Such an abuse could only cause the public to distrust government officials even more than the public already does.

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[1] Will and Ariel Durant, The Story of Civilization, Vol. 10, Rousseau and Revolution 935-36 (1967); Stephen Jay Gould, Bully for Brontosaurus 360-63 (1991).

The mistake Judge Leavy makes in attempting to dismiss the government's "chamber of horrors" by claiming that the government can clean up any disaster by taking over an exemployee's lawsuit is a simple one: it overlooks the agency-wide conflict of interest muddle already made and the rest of the Inspector Fines who haven't yet filed. To quote the government, "Auditors' testimony in government fraud cases, upon which the government places substantial reliance in obtaining criminal convictions and civil judgments, will be subject to impeachment by reason of their potential personal financial interest in the *outcome of their audits.*" (emphasis added). Just as the King's horses and the King's men discovered in the nursery rhyme, this mess would be impossible to unscramble. Moreover, presumably the government *already had* the opportunity to file such a suit and turned it down – just as happened in this case, unless it had been conveniently soft-pedaled by a wily auditor looking towards retirement. Must the government be expected to intervene in a lawsuit in which it has no confidence just to save itself from an errant employee?

When one reads everything pertaining to this issue, the answer comes through loud and clear: *no one* in Congress ever contemplated government employees like Mr. Fine bringing this kind of private lawsuit. The explanation for Congress' failure explicitly to prohibit such a possibility is that it is so far out in left field that no one anticipated that it might happen. Indeed, it is out of the stadium. Judge Leavy asks why Congress would want to turn down dollars recovered this way by an employee? That's the wrong question. The right one is why Congress with one hand would burden employees with conflict of

interest rules, and then encourage them to violate those rules with the other?

Even were I to agree with the dissent that the majority's reading of this statute is strained, my conclusion would be the same. In this respect, I borrow a page from Justice Scalia's concurring opinion in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) where he says,

> We are confronted here with a statute which, if interpreted literally, produces an absurd . . . result. . . . I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption to verify that what seems to us an unthinkable disposition was indeed unthought of. . . . [I]t would suffice to observe that counsel have not provided, nor have we discovered, a shred of evidence that anyone has ever proposed or assumed such a bizarre disposition.

See also Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966) (when the construction of the words of a statute would lead to absurd or futile results, a court may look "beyond those words to the purpose of the act").

Justice Breyer endorses this approach in his 1991 Justice Lester W. Roth Lecture, 65 So.Cal.L.Rev. 845, 848 (1992). Justice Breyer says that

> Blackstone himself, more than two hundred years ago, pointed out that a court need not follow the literal language of a statute where doing so would produce an absurd result. He said that if "collaterally . . . absurd consequences, manifestly contrary to common reason," arise out of statutes, those statutes "are,

with regard to those collateral consequences, void."

In summary, Mr. Fine's lawsuit runs aground not on a shoal, but on the very shores of the territory to which he lays claim. I vote to vacate the panel opinion and to affirm the district court's judgment.

HAWKINS, Circuit Judge, concurrence in which Circuit Judge KOZINSKI joins:

Judge Hall pens a thoughtful opinion and reaches, I believe, an entirely correct result. I would get there via a somewhat different route. This is a case in which we are fundamentally called upon to reconcile two separate Acts of Congress sharing a common purpose: the investigation and reporting of allegations of fraud on the government. The district court should be affirmed because a side by side comparison of these two measures leads inescapably to the conclusion that Congress could not have intended that an auditor in the employ of an Inspector General – whose very job it is to detect and pursue allegations of fraud – should share in the substantial financial rewards intended for those who have no such job.

The policy implications which flow from concluding otherwise are frightening. Agents of the United States who are sworn to gather facts in a fair and neutral manner would, like the small town traffic magistrates of a thankfully bygone era, have a personal financial stake in the outcome of their efforts. Persons whose job it is to discover and report fraud to their supervisors would

benefit from down playing the importance of their discoveries. Congress intended that inspectors general conduct professional inquiries and report the facts as they find them. As part of the effort to detect fraud, Congress also intended to enlist support from "whistleblowers" – persons outside the formal investigative structure. It is difficult to imagine that Congress, through the enactment of these two complementary measures, could have intended the creation of some sort of mad combination of the Sheriff of Nottingham and Inspector Clouseau.

LEAVY, Circuit Judge, with whom Circuit Judge REINHARDT joins, dissenting:

I dissent. There is a reason the majority has difficulty finding common ground for its holding that an Inspector General employee cannot be an "original source" for purposes of a qui tam action. Nothing in the False Claims Act or its legislative history suggests that an Inspector General employee may not bring a qui tam action.

To reach its result, the majority makes two assumptions: first, that Congress failed to consider Inspector General employees as possible qui tam relators, and, second, that, if Congress had considered them, it would have excluded Inspector General employees from the operation of the False Claims Act. It is not our role to legislate on behalf of Congress.

In addition, legislative history shows that, in amending the False Claims Act in 1986, Congress sought to encourage people to come forward with information regarding fraud so that it could recover monies lost to the

treasury. False Claims Amendments Act of 1986; Senate Judiciary Committee, S.Rep. No. 345, 99th Cong., 2d Sess. 9 (1986), reprinted in 1986 U.S.C.A.A.N. 5266. The 1986 amendments were intended, in part, to encourage *government employees* voluntarily to disclose fraud by giving them "an opportunity to speak up and take action without fear and with some assurance their disclosures will lead to results." *Id.* at 5271. It is incongruous for the majority to read these amendments to bar a government employee, such as Fine, who reported the fraud to his supervisors and unsuccessfully urged them to act from bringing a qui tam action.

To encourage qui tam actions, Congress removed a broad jurisdictional bar and set forth a more specific and less restrictive set of jurisdictional bars. 31 U.S.C. § 3730(e). These "[e]xclusions of federal jurisdiction, set out in the 1986 amendments to the False Claims Act, are unusually precise." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). "A straightforward reading of the 1986 False Claims Act reveals that Congress did not explicitly exclude government employees from the class of proper qui tam relators." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1503 (11th Cir. 1991); *accord Hagood*, 929 F.2d at 1420. Neither did Congress explicitly exclude Inspector General employees. Why would Congress? Why would the Government be less willing to take dollars recovered by an Inspector General employee than by any other government employee or by any other person?

To effect the assumed desire of Congress, the majority holds that Inspector General employees do not qualify as original sources because their provision of information

to the Government is not voluntary as required by statute: "the provision of information when one has a legal duty to do so renders the performance of that duty nonvoluntary." This is a contorted view of voluntariness. I have a legal duty not to jay walk. Does that make my failure to jay walk a nonvoluntary act? Our lives are circumscribed with legal duties. That does not make our choices to perform such duties nonvoluntary acts.

It is quite clear why Congress included the "voluntarily" language in the statute. Senator Grassley, the principle sponsor of the 1986 amendments to the False Claims Act, explained the reason on the floor of the Senate. He stated that the purpose was to prevent qui tam actions by a person who is a "source of the allegations only because the individual was subpoenaed to come forward." 132 Cong. Rec. 20,536 (1986). Senator Grassley's remarks provide the only reasonable interpretation of the meaning of the word "voluntarily." The majority's interpretation of the term "voluntarily" is not a reasonable one because it assumes – unnecessarily – that Congress chose a most unlikely and unduly complicated way to achieve a very simple objective. The majority does not explain why Congress did not simply say that some or all government employees are barred from filing qui tam actions, if that was its intent, instead of creating an implicit bar through the requirement that a disclosure be made "voluntarily." The majority's interpretation is made all the more implausible by its admission that Congress might well not have realized that its use of the word "voluntarily" would have the effect that the majority gives to it here.

Finally, in Section IV the majority ignores an area where Congress has acted. To justify leaving some

instances of fraud unpoliced and unpunished, the majority evokes the veritable chamber of horrors which might develop if Inspector General employees were permitted to bring qui tam actions. Congress took care of this. Congress gave the Attorney General control over any qui tam litigation if she, after being served with a copy of the complaint as required by statute, enters an appearance within sixty days of such service. 31 U.S.C. § 3730(2). "If the Government proceeds with the action, the action is conducted only by the Government." *Id.* at 3730(3).

In response to the parade of horribles that some would portray, I would add that I do not believe that Fine or any other government employee enjoys unfettered freedom to file qui tam actions under any and all circumstances. Whether the information on which government employees would base their suits is public or not, they owe their employer or ex-employer a duty of loyalty under common law, as well as a host of related duties under statutes, regulations, and professional codes of ethics. Just as under common law an employee cannot pursue a business opportunity he learned of through his job without notifying his employer of that opportunity and giving his employer a chance to pursue that opportunity, *General Automotive Mfg. Co. v. Singer,* 120 N.W.2d 659 (Wis. 1963), so a government auditor may not file a qui tam action based on information he learned through his job without first giving the government an opportunity to act on the allegations itself. Such common law, statutory, regulatory and ethical obligations – not a strained reading of the word "voluntarily" – are sufficient to meet the concerns raised by my colleagues. In any event, not only are Fine's qui tam actions not barred by

the provisions of statute, but permitting qui tam actions such as Fine's would further the purpose of the statute – ferreting out fraud and recovering money for the federal coffers.

The False Claims Act says "a person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b). Nothing in the Act bars an Inspector General employee, or any other government employee, from bringing the action. I would allow Fine to proceed with his claims.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA EX REL., *Plaintiff,* HAROLD R. FINE *Plaintiff-Appellant,* v. CHEVRON, U.S.A., INC.; BECHTEL PETROLEUM OPERATIONS, INC.; and WILLIAMS BROTHERS ENGINEERING COMPANY, *Defendants-Appellees.*	No. 93-15012 D.C. No. CV 91-03224-RHS

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, Senior District Judge, Presiding

UNITED STATES OF AMERICA EX REL., *Plaintiff,* HAROLD R. FINE *Plaintiff-Appellant,* v. THE UNIVERSITY OF CALIFORNIA, and THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Defendants-Appellees.*	No. 93-15728 D.C. No. CV 91-03608-FMS OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
March 16, 1994 – San Francisco, California

Filed November 2, 1994

Before: Herbert Y.C. Choy, Stephen Reinhardt,
and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

COUNSEL

Stuart M. Nelkin, Nelkin & Nelkin, Houston, Texas; Alan B. Exelrod, San Francisco, California, for Fine, plaintiff-appellant.

Alson R. Kemp, Jr., and Michael F. Labianca, Pillsbury, Madison & Sutro, San Francisco, California, for Chevron, U.S.A., Inc., defendant-appellee.

Scott L. Gardner, Thelen, Marrin, Johnson & Bridges, San Francisco, California, for Bechtel Petroleum Operations, Inc., defendant-appellee.

Weyman I. Lundquist and Stephanie M. Hinds, Heller, Ehrman, White & McAuliffe, San Francisco, California, for Williams Brothers Engineering Co., defendant-appellee.

John B. Clark, William D. Hunter, and Patrick J. Martell, Pettit and Martin, San Francisco, California, for the University of California and the Board of Regents of the University of California, defendants-appellees.

Glenn S. Kaplan, United States Department of Justice, Civil Division, Washington, D.C., for United States, plaintiff-amicus.

OPINION

LEAVY, Circuit Judge:

These are appeals from orders entered by the United States District Court for the Northern District of California dismissing for lack of subject matter jurisdiction two qui tam actions brought under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et. seq.*, by Harold R. Fine. Fine filed one action on behalf of the United States against Chevron, Bechtel, and Williams Brothers to recover damages and penalties for alleged fraud in the execution of contracts for the management and operation of the Strategic Petroleum Reserve. Fine filed the second action on behalf of the United States against the University of California to recover damages and penalties for alleged fraud in the maintenance and operation of the Los Alamos National Laboratory and Livermore National Laboratory. The information upon which Fine based his claims was discovered during his employment as an auditor for the United States Department of Energy, Office of Inspector General, Office of Audits. In separate rulings, the district court dismissed both actions on the grounds that Inspector General auditors are barred from bringing qui tam actions arising from Inspector General audits and/or the court lacked jurisdiction because Fine was not an "original source" under the FCA.[1] Fine timely appealed both

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[1] In *United States ex rel. Fine v. Chevron, U.S.A.*, the district court judge orally held that "it makes no sense" to permit Fine to bring a qui tam action. In *United States ex rel. Fine v. The University of Cal.*, the judge, in a written order, stated both the reasons given above for granting the motion to dismiss.

dismissals. The appeals were consolidated. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse and remand.

FACTS AND PROCEEDINGS

Fine worked in the Office of Audits of the Office of the Inspector General at the U.S. Department of Energy (DOE-IG) from September 1982 until July 18, 1991. Fine was employed by the DOE-IG as Assistant Manager of the Western Region Audit Office in Albuquerque, New Mexico. As part of his job responsibilities, Fine conducted audits and supervised others who conducted audits of contracts entered into by and between DOE and private contractors. As an audit supervisor, Fine's responsibilities extended to audits at the DOE's eleven western field offices and twenty-six integrated contractor sites including the Strategic Petroleum Reserve, the Los Alamos National Laboratory, and the Lawrence Livermore National Laboratory. Fine retired from the DOE-IG office on July 18, 1991.

After retiring, Fine brought these qui tam actions based on information he acquired while he was employed as an auditor. Fine alleged that, despite his repeated urgings, his supervisors at the DOE-IG office and other DOE officials refused to take action against the defendants. As required by the FCA, Fine's complaints were filed and kept under seal to allow the United States Government to determine whether to intervene. 31 U.S.C. § 3730(b)(2). The Government declined to participate in the actions and the district court ordered Fine's complaints unsealed and served. The defendants moved to

dismiss. The district court granted the motions on two grounds: 1) that the FCA construed in relation to the Inspector General Act, 5 U.S.C. app. 3, bars Inspector General employees from bringing qui tam actions based upon information obtained in an Inspector General Audit or investigation; and 2) the district court lacked subject matter jurisdiction under the FCA, 31 U.S.C. § 3729 *et seq.* (1986).

ANALYSIS

Standards of Review

We review de novo a district court's decision on subject matter jurisdiction. *Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 554 (9th Cir. 1992). The district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous. *Id.*

The False Claims and Inspector General Acts

Many courts have discussed the history of the False Claims Act. What we repeat here of that discussion is necessary to our analysis of the relationship between the False Claims and Inspector General Acts.

The False Claims Act is a tool for combatting fraud perpetrated against the United States Government. False Claims Amendments Act of 1986; Senate Judiciary Committee, S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 ("S. Rep."). It was enacted during the Civil War at the behest of President Abraham Lincoln to control fraud in defense contracts. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d

1493, 1497 (11th Cir. 1991) (citation omitted). The original Act allowed private citizens with knowledge of fraud to sue the perpetrators of the fraud on behalf of the government (a "qui tam" action) and recover a share of the damages. *Id.* Such was the state of the FCA for the next 80 years.

In the late 1930's, several qui tam actions were brought by persons who had no independent or personal knowledge of the fraud which they were alleging, but apparently based their actions on information obtained from criminal indictments brought by the government. *Id.* (citation omitted). Such actions were labeled "parasitic" or "copy-cat" suits. The Supreme Court resolved the legitimacy of such suits in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The Court held that such actions were not barred by the statute and that qui tam actions may be filed by anyone, regardless of the source of the information forming the basis of the suit. *Id.* at 540-48. The ruling in *Hess* led Congress to amend the qui tam provisions of the FCA. The 1943 amendments barred qui tam actions based on information which the Government possessed, regardless of whether the Government was actually using the information to prosecute fraud. S. Rep. at 5277.

In 1978, Congress passed the Inspector General Act, 5 U.S.C. app. 3, ("IGA") to combat fraud in government contracts and within government agencies and departments. 5 U.S.C. app. 3 § 2(B). The IGA established independent offices within various federal departments and agencies. *Id.* at § 2. These offices are charged with monitoring, investigating, and reporting fraud. *Id.* at §§ 4-6.

"Even after passage of the IGA, Congress felt that there existed 'serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools' for prosecuting fraud." *United States ex rel. Fine v. MK-Ferguson Co.*, 1994 WL 487951 at 2 (D.N.M. Aug. 29, 1994) (quoting S. Rep. at 5269). "[M]ost fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected." S. Rep. at 5269. "Congress amended the False Claims Act in 1986 by expanding the scope of qui tam actions. The 1986 amendments sought to strike a balance between, on the one hand, encouraging people to come forward with information regarding fraud, and on the other, preventing parasitic lawsuits. The amendments replaced the general jurisdictional bar on qui tam actions based on information in the possession of the government with a more specific and less restrictive set of jurisdictional bars." *MK-Ferguson Co.*, 1994 WL 487951 at 2.[2]

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[2] No court shall have jurisdiction over an action brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces. 31 U.S.C. § 3730(e)(1).

No court shall have jurisdiction over an action brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought. *Id.* (e)(2)(A).

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. *Id.* (e)(4)(A).

For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the

After reviewing the purpose of the IGA and FCA, the district court held that "IG employees may not bring qui tam actions under the FCA against any entity wherein the relevant information was obtained as part of an IG investigation." The structure of the FCA makes it clear that no such prohibition exists. The "[e]xclusions of federal jurisdiction, set out in the 1986 amendments to the False Claims Act, are unusually precise." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). "A straightforward reading of the 1986 False Claims Act reveals that Congress did not explicitly exclude government employees from the class of proper qui tam relators." *Williams*, 931 F.2d at 1503; *accord Hagood*, 929 F.2d at 1420. Furthermore, the IGA is discussed at some length in the legislative history of the 1986 amendments to the FCA. *See* S. Rep. at 5269-73. To judicially infer an IG employee jurisdictional bar in the qui tam provisions of the FCA, we would have to assume that Congress failed to consider Inspector General employees as possible qui tam relators, and that if Congress had considered them, they would have been compelled to exclude them from the operation of the Act. "It is not for this Court to make such assumptions, especially in light of the importance of qui tam jurisdiction to the history of the FCA and the attention the IGA received in the legislative history of the 1986 amendments." *MK-Ferguson Co.*, 1994 WL 487951 at 3. "The new jurisdictional bars were carefully crafted. They were framed by

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information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information. *Id.* (e)(4)(B).

those surely aware of [Marcus v.] *Hess*, its holding that 'any person' means 'any person,' and its declaration that arguments about the limits on suits by informers should be addressed to Congress not the courts." *Hagood*, 929 F.2d at 1420.

"Original Source" Requirement

The 1986 amendments to the False Claims Act prohibit courts from asserting jurisdiction over the subject matter of qui tam actions which are:

> based upon the *public disclosure* of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is the *original source* of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). Title 31 U.S.C. § 3730(e)(4) defines "original source" as "an individual who has *direct and independent* knowledge of the information on which the allegations are based and has *voluntarily* provided the information to the Government before filing an action under this section which is based on the information." (Emphasis added.)

In both actions filed with the district court, Fine conceded that his allegations of false claims had been publicly disclosed within the meaning of § 3730(e)(4)(A). The district court ruled that it did not have jurisdiction over the actions because Fine was not an "original

source." This court has held that in order to be an "original source," a qui tam relator must allege that he (1) has direct and independent knowledge of the information, (2) voluntarily provided the information to the government, and (3) either directly or indirectly assisted in the public disclosure of the information. *Chen-Chen Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). The district court reasoned that Fine did not have "direct and independent knowledge" of the information because he either received the information from field auditors he supervised or from the entities he audited. The district court also reasoned that Fine had not "voluntarily provided" the government with the information prior to filing the lawsuit because, as an auditor employed by the DOE-IG, Fine had a duty to disclose fraud to his supervisors. Finally, the district court found that Fine was not a direct or indirect source because he was a recipient of information collected through the audits, not a source.

1. Direct and Independent Knowledge

Fine alleges he acquired the information upon which he bases his suits while employed by the government either through personally conducting audits, through directing the audits performed by his subordinates, or through personally developing audit programs which lead to the acquisition of information. Wang was a mechanical engineer who brought suit under the FCA against his former employer. During the course of his employment, Wang had become aware of defects in a transmission system used in vehicles sold to the government. We said:

> The district court, purporting to follow *Houck on Behalf of the United States v. Folding Carton Administration Committee*, 881 F.2d 494, 505 (7th Cir. 1989), held that Wang's knowledge was not "direct and independent." This was error. *Houck* stands for the simple proposition that where one would not have learned of the information but for its public disclosure, one does not have "direct and independent knowledge" of the information. Wang had personal knowledge of the Bradley's transmission problems because he worked (however briefly) on trying to fix them. . . . Wang's knowledge of the transmission problems was "direct and independent" because it was unmediated by anything but Wang's own labor.

Wang, 975 F.2d at 1417 (citation omitted).

This is not a case in which Fine would not have acquired the information upon which he bases his suit "but for" the public disclosure of the audit reports. Rather, he acquired his knowledge prior to the public disclosure while reviewing audit sheets and other financial records. Fine's own labor led to his discovery of the allegedly fraudulent payments. Thus, he had "direct and independent knowledge" of the information upon which he based the allegations contained within his complaints.

2. *Voluntary Disclosure*

Fine disclosed the fraud he discovered to his superiors while employed by the Office of Inspector General. This was a job requirement. The district court concluded that, because Fine's disclosure was required, it was not "voluntary." We think this is reading too much into the

statute. All government employees are under an obligation to disclose fraud they discover in the course of their employment to their employers. The legislative history of the 1986 False Claims Act amendments indicates that Congress was concerned about the failure of government employees to report fraud:

> In 1983, the U.S. Merit Systems Protection Board conducted a survey of approximately 5,000 Federal Government employees to determine to what extent observed fraud, waste, and abuse was going unreported. The Merit Systems Board reported that 69 percent of those who believed they had direct knowledge of illegalities failed to report the information. Those employees who chose not to report fraud were then asked why they failed to come forward. The most frequently cited reason given (53 percent) was the belief that nothing would be done to correct the activity even if reported. . . . The Committee believes changes are necessary to halt the so-called "conspiracy of silence" that has allowed fraud against the Government to flourish.

S. Rep. at 5269-71.

The 1986 False Claims Act amendments were intended to encourage government employees voluntarily to disclose fraud by giving them "an opportunity to speak up and take action without fear and with some assurance their disclosures will lead to results." *Id.* at 5271. It would be incongruous for us, therefore, to read the "voluntary disclosure" requirement to bar a government employee who has gone to his supervisors to report fraud from bringing a qui tam action. Fine "voluntarily disclosed" within the meaning of § 3730(e)(4)(E).

3. *Direct or Indirect Assistance in the Public Disclosure of the Information.*

As alleged in his complaints, Fine prepared the original audit programs and draft reports which outlined the alleged fraud. Fine made repeated attempts to have his superiors act upon the information he had provided them, but no action was ever taken.

> It is important to note that under the rule we adopt today, *all* those who "directly or indirectly" disclose an allegation might qualify as its original source. Anyone who helped to report the allegation to either the government or the media would have "indirectly" helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a qui tam suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence," and not their mimics.

Wang, 975 F.2d at 1419 (citations omitted) (emphasis in original).

Fine helped report the allegations of fraud to the government before the allegations were publicly disclosed. Therefore, under *Wang*, Fine "directly or indirectly" disclosed the allegations of fraud. Fine was an "original source" under the FCA.

Eleventh Amendment Immunity

Because we review the district court's determinations of subject matter jurisdiction de novo, the University of California asks us to consider an alternate basis for dismissal argued by the University but not decided by the district court: that the Eleventh Amendment of the United States Constitution bars Fine's action against the University. The Eleventh Amendment precludes federal court jurisdiction over actions brought by private citizens against a state, its agencies or departments. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). The University is a state entity for purposes of the Eleventh Amendment, and the State of California has not waived its Eleventh Amendment immunity. *BV Eng'g v. University of Cal., L.A.*, 858 F.2d 1394, 1395-96 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). The United States may sue states in federal courts notwithstanding the Eleventh Amendment. *United States v. Mississippi*, 380 U.S. 128 (1965); *West Virginia v. United States*, 479 U.S. 305 (1987).

Thus, if Fine's action against the University of California is a suit by the United States, it is not barred by the Eleventh Amendment. This court recently concluded that "in a *qui tam* action, the government is the real party in interest." *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994). Thus, Fine's qui tam action against the University of California is not barred by the Eleventh Amendment.

We REVERSE the district court's dismissal of Fine's qui tam actions and REMAND for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. FINE, Plaintiff(s), vs. THE UNIVERSITY OF CALIFORNIA AND THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant(s).	No. C91-3608-FMS ORDER GRANTING MOTION TO DISMISS (Filed Apr. 5, 1993)

INTRODUCTION

Relator, Harold R. Fine ("Mr. Fine"), brought this *qui tam* action against the University of California ("University"), alleging violations of the False Claims Act ("FCA"). Defendants filed this motion to dismiss claiming that (1) the Court lacks subject matter jurisdiction to review this case because Mr. Fine's claims are based on information that was publicly disclosed prior to the filing of the action and Mr. Fine was not an "original source" of the disclosed information; (2) Inspector General employees should be barred from bringing FCA *qui tam* actions because such actions conflict with the Inspector General Act ("IGA"); (3) construing the FCA to confer *qui tam* standing on members of the investigative and prosecution arms of the executive branch violates the principles of separation of powers; and (4) the Eleventh

Amendment precludes this Court's exercise of jurisdiction.

The Court grants defendants' motion to dismiss because Mr. Fine was not an "original source" and IG auditors should be barred from bringing *qui tam* actions arising from IG audits.

FACTS

From September 1982 through July 18, 1992, Mr. Fine was employed by the Office of the Inspector General ("IG") at the United States Department of Energy ("DOE"). Mr. Fine was an assistant manager of the Western Region Audit Office. Mr. Fine both conducted audits and supervised other auditors of contractors doing business with the DOE. Among those were audits relating to the University.

Mr. Fine states that during the course of his work, he brought suspected violations of the FCA to the attention of his supervisors. He alleges that his superiors were unwilling to either prosecute or institute civil actions against the alleged violators. The suit, however, does not name any government officials who were allegedly corrupt or incompetent.

Mr. Fine alleges that he continued to investigate, at his own expense, his suspicions of fraud, misuse, and taxing of appropriated funds addressed in the complaint. After his retirement, Mr. Fine brought seven *qui tam* actions. Of these seven actions, two were voluntarily dismissed and one was dismissed by this Court (Schnacke, J.) for lack of subject matter jurisdiction.

United States ex rel. Fine v. Chevron, U.S.A., No. C91-3224 (N.D. Cal.).

Mr. Fine's initial complaint alleged that: (1) defendants, between 1986-1989, intentionally circumvented regulations restricting the amount the University could spend on exploratory research and development ("ER&D"), and (2) defendants deliberately made false claims to the government relating to their operation of electrical, water, and natural gas utilities. The complaint was later amended to allege that the practice of circumventing regulations continued into 1991-1992. The amended complaint also added the allegation that defendants had obtained unauthorized payments from the United States to subsidize their employees' use of the cafeteria and transport to the airport. The complaint was amended further to allege that defendants improperly expended funds obtained under the Civilian Nuclear Waste Policy Act.

The FCA requires that a *qui tam* complaint be filed in camera and kept under seal so that the United States may review the complaint and determine whether intervention is appropriate. The Department of Justice declined to intervene and, in fact, joins the defendants in this motion to dismiss. The United States filed a brief as *amicus curie* asking for dismissal of this action for substantially the same reasons as defendants.

HISTORY OF THE FALSE CLAIMS ACT'S WHISTLE BLOWER PROVISIONS

The FCA provides penalties for those Who knowingly present false or fraudulent claims to the United

States and incentives for whistleblowers who expose the fraud by filing *qui tam* actions. The FCA, as enacted in 1863, included no restrictions on "parasitic" suits. A "parasitic" suit is one in which a person with no independent knowledge of the fraud at issue files a *qui tam* action based on either the government's investigation of the incidents of fraud or other public disclosures solely to share in the award. In 1943, the Supreme Court ruled that a relator who brought a *qui tam* action based purely on allegations copied from a criminal indictment was entitled to proceed and share in any award. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The Court held that nothing in the FCA prohibited a *qui tam* action based solely on information already in the government's possession and that such prohibition, if intended, was a matter for Congress. *Id.*

Congress responded to this decision by amending the FCA. The 1943 amendments barred all *qui tam* actions based on information already in the government's possession. 31 U.S.C. § 3730(b)(4) (1982) (superseded) 89 Cong. Rec. 10844 (1943). These amendments were interpreted to preclude all *qui tam* actions once any government agency had knowledge of the alleged fraud. In *United States ex rel. Wisconsin (Dept. of Health and Social Services) v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the state of Wisconsin independently investigated Medicaid fraud and reported its findings to the government as required by law. The Seventh Circuit affirmed dismissal of the *qui tam* plaintiff because of that disclosure, stating that the responsibility to protect relators who informed the government of their suspicions of fraud lay with Congress. *Id.* at 1106.

In 1986, Congress amended the *qui tam* provisions to the FCA once again. The 1986 amendments repealed the "government knowledge" jurisdictional bar of the 1943 amendments. To avoid "parasitic" suits, Congress enacted narrow exceptions to *qui tam* jurisdiction. These exceptions provide as follows:

> Section 3730(e)(4)(A) No Court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Pursuant to these amendments, once public disclosure occurs, a *qui tam* action is barred unless the relator is the "original source" of the information. *See e.g., United States ex rel. Doe v. John Doe Corp.*, 960 F.2nd 318, 324 (2nd Cir. 1992). Furthermore, the Ninth Circuit has held that in order for jurisdiction to lie, the relator must not only be the "original source" of the information but must have been a direct or indirect source of the public disclosure that gave rise to the jurisdictional bar. *Chen-Cheng Wang ex rel. United States v. FMC Corp.*, 975 F.2nd

1412, 1419-20 (9th Cir. 1992) ("If there is to be a bounty for disclosing those troubles, it should go to one who in fact helped to bring them to light.").

DISCUSSION

A. Subject Matter Jurisdiction Under 31 U.S.C. § 3730(e)(4)

Mr. Fine concedes that his claims are based on information that was publicly disclosed. Accordingly, this Court has jurisdiction only if Mr. Fine can demonstrate that he is an "original source." In order to prove that he is the original source, Mr. Fine must show that (1) he had "direct and independent knowledge of the information on which his allegation[s are] based"; and (2) he "voluntarily provided the information to the Government" before filing his *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). Mr. Fine must also prove that he was, directly or indirectly, a source of the public disclosure. *Wang*, 975 F.2nd at 1420; *see also United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, ___ F.2d ___, 1993 WL 12285 (2nd Cir. 1993); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2nd 13, 17 (2nd Cir. 1990).

1. Direct and Independent Knowledge

The Ninth Circuit has defined the "direct and independent knowledge" requirement quite simply. "[W]here one would not have learned of the information but for its public disclosure, one does not have "direct and independent knowledge." *Wang*, 975 F.2d at 1417. In *Wang*, the relator had "direct and independent knowledge" because

he was a mechanical engineer who worked on the problem and "saw [it] with his own eyes." *Id.* His knowledge was "unmediated by anything but [his] own labor." *Id.*

Mr. Fine claims that he, like Wang, saw fraudulent activities with his own eyes when he examined documents in the course of his work. He claims that all of his allegations are based upon knowledge acquired through his own audits or his supervision of other auditors. He claims to have personally developed audit programs that led to the acquisition of the information on which his complaint is based. Defendants counter that Mr. Fine would never have had access to any of those documents but for their public disclosure by laboratory employees in administrative audits. As such, he is a recipient, not a source, of the public disclosures.

In *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990) *cert. denied* ___ U.S. ___, 111 S.Ct. 1312 (1991), the First Circuit dealt with a situation similar to the instant case. LeBlanc was a Quality Assurance Specialist for the United States Government Defense Contract Administrative Service. He brought a *qui tam* action based on fraud he observed in handling government contracts by the defendant. The Court held that a government employee in LeBlanc's position could not qualify as an "original source." *Id.* at 20. It was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer – the government. Thus, LeBlanc was not someone with 'independent knowledge of the information' as required by the statute." *Id.* The Court went on to state that this holding

does not apply to all government employees but only those in LeBlanc's position. *Id.*[1]

The present case is even more compelling than *LeBlanc* and suffers from none of the same defects. Public disclosure has been conceded here. Mr. Fine's position was that of auditor and supervisor. He gleaned his information by reviewing reports turned over to the federal government and, often, prepared by other auditors. In his deposition, Mr. Fine admits to gathering information by looking through, for example, work papers prepared by other auditors. Some of the information Mr. Fine claims to have received through anonymous tips. This information cannot be direct. It was received, second-hand, from the anonymous tipper who had direct knowledge.

None of the information on which Mr. Fine bases his complaint is direct, as defined by the Third Circuit as " 'marked by absence of an intervening agency, instrumentality, or influence: immediate.' " *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991) quoting *Webster's Third New International Dictionary* 640 (1976). Mr. Fine saw no fraud with his own eyes. He saw reports and audits of alleged fraud, presented by various intermediaries. As a supervisor, the information he received was obtained

---

[1] The Eleventh Circuit, in *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991), found that the *LeBlanc* court "went one step to far" by ruling on the issue of "original source" when there was no public disclosure. *Id.* at 1501 n. 13. While the Court also criticized the broad district court opinion in *LeBlanc*, it did not criticize the First Circuit's narrower holding that a government employee whose job it is to uncover fraud could not qualify as an "original source."

from the field auditors. As an auditor, the information he received was obtained from the entities he audited. Even the investigations Mr. Fine alleges he carried out after his retirement consisted of examining government documents, including audit work papers and audit lead sheets, and speaking with other government officials. Because Mr. Fine, "would not have learned of the information but for its public disclosure, [he] does not have 'direct and independent knowledge of the information.' " *Wang*, 975 F.2d at 1417.

2. Voluntarily Provided

In order to qualify as an "original source," a relator must also have "voluntarily provided" the government with the information prior to filing the lawsuit. 31 U.S.C. § 3730(e)(4)(B). As an auditor employed by the DOE-IG, Mr. Fine had a duty to disclose fraud to his supervisors. Indeed, that was the paramount responsibility of his position. To do otherwise would likely have been grounds for his termination; therefore, his actions cannot be construed as "voluntary." They were compelled by the nature of his employment.

3. Source to the Entity That Made Public Disclosure

Finally, in order to be an "original source," Mr. Fine must have been a direct or indirect source to the entity that publicly disclosed the information. *See Wang*, 975 F.2d at 1419; *Dick*, 912 F.2d at 17. Mr. Fine must demonstrate that his was one of the voices that led to the disclosure of the alleged fraud. "A 'whistleblower'

sounds the alarm, he does not echo it." *Wang*, F.2d at 1419.

Mr. Fine alleges that his investigations led to the discovery of the information upon which his suit is based. He claims that he then disclosed the information to his superiors but nothing was done, despite his repeated efforts. The complaint contains no allegations against any DOE-IG employees for misconduct or incompetence. His superiors' discretionary decision not to take action does not convert Mr. Fine into an original source.

Defendants present a distinction between a source of information and a recipient. The Court finds this distinction compelling. IG auditors are collectors of information. They are hired, trained and paid to collect exactly the type of information upon which Mr. Fine bases his complaint. Their job is to review the information presented by others. Accordingly, they can only be recipients of information, not its sources.

B. The False Claims Act and the Inspector General Act

Nothing in section 3730(e)(4)(A) precludes all government employees from bringing *qui tam* actions based on information they acquired during the course of their employment. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1501 (11th Cir. 1991). Government employees whose knowledge of events giving rise to a *qui tam* action arises from audits, investigations and the review of government publications, however, can be precluded from bringing a *qui tam* action because their information is not "direct and independent." They cannot be

"original sources" because the information they acquire is necessarily second-hand.[2]

Furthermore, the policy reasons presented by defendants for preventing IG auditors from bringing *qui tam* actions are compelling. Both the FCA and IGA are critical to the government's anti-fraud efforts. The FCA allows recovery and imposes penalties for fraudulent activities. The IGA establishes independent agencies within each federal department to monitor, investigate and report fraud. The purposes of the acts are the same – to ferret out fraud against the government.

Allowing IG auditors to reap huge bounties from *qui tam* actions could create serious ethical conflicts and prevent them from fulfilling their employment responsibilities. It would create a perverse incentive. Rather than reporting their findings of fraud as required by the IGA, auditors could hire private counsel and collect a percentage of any award granted pursuant to the FCA by filing suit when they first learn of suspected fraud. All FCA awards would then be shared with the government employees whose paid responsibility it was to investigate

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[2] Mr. Fine's reliance on *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), is misplaced. In *Hagood*, there was no public disclosure and, accordingly, no discussion of "original source." This Court bases its holding regarding the inability of IG auditors to file *qui tam* actions on the fact that they cannot be "original sources" because they cannot have "direct and independent" knowledge of information they acquire as a result of audits and cannot "voluntarily provide" information it is their duty as auditors to disclose.

the fraud. Furthermore, whistleblowers might be unwilling to disclose fraud to the IG, the agency charged with encouraging and protecting them, *see* 5 U.S.C. App. 3 § 7, if by doing so they risk losing their financial incentive to the auditor. "*Qui tam* suits are meant to encourage *insiders* privy to a fraud on the government to blow the whistle on the crime." *Wang*, 975 F.2d at 1419 (emphasis added). The purpose of the FCA is "encouraging 'private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.' " *Id.* citing H.R. Rep No. 660, 99th Cong., 2d Sess. 22 (1986). Acting in his employment capacity as an IG auditor, Mr. Fine was a representative of the government, not a private individual and insider.

This Court agrees with Judge Schnacke's holding in *United States ex rel. Fine v. Chevron, U.S.A.*, No. C91-3224 (N.D. Cal.), that "it makes no sense" to permit government employees who receive salaries for the purpose of uncovering and reporting fraud to collect bounties under the FCA. Mr. Fine's filing of seven *qui tam* actions upon retiring from the DOE-IG is an example of the consequences that would inevitably result. Because laws must be construed in a manner that integrates statutory schemes and avoids absurd results, *United States v. American Trucking Assns.*, 310 U.S. 534, 542-22 (1940), the Court holds that IG employees may not bring *qui tam* actions under the FCA against any entity wherein the relevant information was obtained as part of an IG investigation.

B. Other Issues

Because this Court holds that Mr. Fine is not an "original source" of the information on which he bases his complaint, there is no need to address defendants' separation of powers or sovereign immunity arguments.

CONCLUSION

For the reasons stated above, the Court finds that it does not have subject matter jurisdiction over this case pursuant to 28 U.S.C. § 3730. The motion to dismiss is GRANTED.

The clerk of the Court is directed to close the file.

SO ORDERED.

DATED: April 5, 1993

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ROBERT H. SCHNACKE, JUDGE

UNITED STATES OF AMERICA EX REL. HAROLD R. FINE, PLAINTIFF, VS. CHEVRON, U.S.A., INC., BECHTEL PETROLEUM OPERATIONS, INC., AND WILLIAMS BROTHERS ENGINEERING COMPANY, DEFENDANTS.	NO. C-91-3224 RHS

SAN FRANCISCO, CALIFORNIA
FRIDAY, NOVEMBER 20, 1992

TRANSCRIPT OF PROCEEDINGS

(APPEARANCES ON NEXT PAGE)

REPORTED BY: LAWRENCE J. WHITE, CSR, CP, CM
OFFICIAL REPORTER, USDC

COMPUTER-AIDED TRANSCRIPTION BY TURBOCAT

* * *

[p. 14] THE COURT: ON THAT POINT, I AGREE WITH YOU. I AM CONSIDERING THE MOTION AS DIRECTED SOLELY AGAINST THE AMENDED COMPLAINT.

THE AMENDED COMPLAINT WILL BE DISMISSED. DISMISSAL WILL BE BASED ON LACK OF SUBJECT MATTER JURISDICTION, AND ALL OTHER MOTIONS, THEREFORE, ARE MOOT AND WILL NOT BE ACTED UPON.

MOTIONS TO STRIKE WILL BE DENIED AS BEING MOOT, AND WE WILL ISSUE A JUDGMENT THAT THE AMENDED COMPLAINT IN THE CASE AT BAR IS DISMISSED, IN ACCORDANCE WITH MY PRIOR ORDER THAT, IN THE FUTURE, MR. FINE WILL RECEIVE NO RELIEF FOR [p. 15] HIMSELF OR ON THE UNITED STATES BEHALF IN THIS CASE AND THAT IN THIS CASE THE DEFENDANTS ARE ENTITLED TO RECOVER FROM THE PLAINTIFF DEFENDANTS' COSTS PROVIDED IN 28 USC 1919 OF THE FEDERAL RULES OF CIVIL PROCEDURE, 54(D).

* * *

(RECESS)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-15012
CT/AG#: CV-91-03224-SBA
OAKLAND [75DB]

UNITED STATES OF AMERICA, ex rel.

Plaintiff

HAROLD R. FINE (Filed Feb. 8, 1996)

Plaintiff-Appellant

v.

CHEVRON USA, INC.; BECHTEL PETROLEUM OPERATIONS, INC.; WILLIAMS BROTHERS ENGINEERING COMPANY

Defendants-Appellees

NO. 93-15728
CT/AG#: CV-91-03608-FMS [78DB]

UNITED STATES OF AMERICA, ex rel;

Plaintiff

HAROLD R. FINE

Plaintiff-Appellant

v.

UNIVERSITY OF CALIFORNIA, and the Board of the Regents of the University of California.

Defendant-Appellee

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 12, 1995

costs taxed in 93-15012

[SEAL] Department of Justice

STATEMENT

OF

STUART M. GERSON
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL
RIGHTS COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE QUI TAM PROVISIONS OF THE
FALSE CLAIMS ACT

AND

H.R. 4563

ON APRIL 1, 1992

Congress has never reconsidered this issue. There is no mention of suits by government employees at all in the voluminous legislative history to the 1986 amendments and no indication that anyone wanted to overrule the 1943 bar on government employee suits. Nevertheless, because of inadvertent language changes in 1986, the Ninth and Eleventh Circuit Courts of Appeal have held that the statute cannot be read to preclude jurisdiction over government employee suits. Since these recent decisions, another dozen government employee cases have

been filed, the trend is accelerating, and we expect it to continue to accelerate in the future.

The Adverse Impact of Government Employee Suits

These courts of appeals holding create tremendous difficulties for us. Every government employee has a duty to his employer to report what he knows about fraud. Government employee *qui tam* cases thus do not add to the government's knowledge, since by definition the government already knows or should know what its employees know about fraud. The duty to report is set out in numerous executive orders, federal regulations, and policy statements, and is a fundamental part of the common law of agency.

There are criminal statutes, moreover, forbidding government employees from receiving more than their salaries for work that they are already required to perform and for working on matters in which they have a financial interest. Similarly, government

* * *

5 No. 3 DOJALT 9 **Page 1**
5 NO. 3 DOJ Alert 9
5 No. 3 DOJ Alert 9
(Publication page references are not available for this document.)

DOJ Alert

February 20, 1995

In Brief

QUI TAM REFORM DROPPED

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Aides to Sen. Charles Grassley (R-Iowa) said last month that he has abandoned plans to reintroduce False Claims Act reforms out of fear that government contractor influence in Congress would draw amendments that would weaken the act.

The legislation Grassley has wanted to introduce would have put special restrictions on government employees who file False Claims Act suits privately and would help other whistleblowers protect their right to a share of the recovery.

The legislation was not introduced in the last Congress because Grassley and the administration could not reach agreement on issues that now seem narrow in light of the subsequent political climate (see DOJ Alert, Feb. 21, 1994, p. 6).

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No. 95-1445

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

UNITED STATES ex rel. HAROLD R. FINE,
Petitioner,

vs.

CHEVRON, U.S.A., INC., et al.,
Respondents.

Opposition On Behalf Of Respondents The Regents Of The University Of California And University Of California To Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 10, 1996

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22pp

QUESTION PRESENTED

1. Whether petitioner, having obtained his information as an Inspector General employee, whose specific statutory duty was to investigate and report fraud, "voluntarily provided" the information to the government prior to commencing the *qui tam* actions for purposes of qualifying as an "original source" of the government's information under 31 U.S.C. § 3730(e)(4)(B).

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No. 95-1445

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES ex rel. HAROLD R. FINE,
Petitioner,
vs.
CHEVRON, U.S.A., INC., et al.,
Respondents.

Opposition On Behalf Of Respondents The Regents Of The University Of California And University Of California To Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is a former Assistant Manager in the Western Region Audit Office of the Department of Energy's ("DOE") Office of the Inspector General ("IG" or "OIG") stationed in Albuquerque, New Mexico. Shortly after his retirement on July 18, 1991, he filed seven actions under the *qui tam* provisions of the False Claims Act

("FCA"), 31 U.S.C. § 3730, including the two at issue here. (Petition, App. 5a.) In his action against The Regents of the University of California and the University of California (collectively the "University"), filed in the United States District Court for the Northern District of California, Mr. Fine conceded that his action was based on allegations and transactions which had been publicly disclosed in one or more of the ways set forth in 31 U.S.C. § 3730(e)(4)(A). (Petition, App. 48a.) Therefore, the court had subject matter jurisdiction over the *qui tam* action only if Mr. Fine was an "original source" of the government's information. 31 U.S.C. § 3730(e)(4)(B).

After the government declined to participate and the complaint was unsealed and served on the University, Mr. Fine admitted in his deposition that he obtained most of his information in his capacity as audit supervisor for the Office of the Inspector General of the DOE.

> He gleaned his information by reviewing reports turned over to the federal government, and, often, prepared by other auditors. In his deposition, Mr. Fine admits to gathering information by looking through, for example, work papers prepared by other auditors.

(Petition, App. 50a (quoting from the Order Granting Motion to Dismiss issued by the district court in Mr. Fine's action against the University).) On April 5, 1995, the district court, in response to the University's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), which was supported by the government, as amicus, entered a final judgment dismissing the action for want of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4), on the grounds petitioner failed to qualify as an "original source" of the government's information. (Petition, App. 43a-55a.) The district court concluded that petitioner failed to meet any of the requirements for an original source, including the

requirement that before filing an action, the relator had "voluntarily provided the information to the government." 31 U.S.C. § 3730(e)(4)(B). The district court held that:

> As an auditor employed by the DOE-IG, Mr. Fine had a duty to disclose fraud to his supervisors. Indeed, that was the paramount responsibility of his position. To do otherwise would likely have been grounds for his termination; therefore, his actions cannot be construed as "voluntary." They were compelled by the nature of his employment.

(Petition, App. 51a.)

Construing the Inspector General Act of 1978 (5 U.S.C. App. 3 § 1 *et seq.*) in relation to the False Claims Act, the district court also found as an independent ground for dismissal that:

> IG employees may not bring *qui tam* actions under the FCA against any entity wherein the relevant information was obtained as part of an IG investigation.

(Petition, App. 54a.)

Following Mr. Fine's appeal and the consolidation of the appeals herein, a panel of the Ninth Circuit reversed the district court dismissals. The panel reasoned that Mr. Fine's disclosures to his supervisors were "voluntary" because: (1) "[a]ll government employees are under an obligation to disclose fraud they discover in the course of their employment to their employers;" (2) "the 1986 False Claims Act amendments were intended to encourage government employees voluntarily to disclose fraud;" and (3) "[i]t would be incongruous . . . to read the 'voluntary disclosure' requirement to bar a government employee who has gone to his supervisors to report fraud from bringing a *qui tam* action." (Petition, App. 39a-40a.)

Following the grant of petitions for rehearing, the Ninth Circuit, sitting *en banc*, vacated the panel decision and affirmed the district court's dismissals of petitioner's *qui tam* actions for lack of subject matter jurisdiction. The *en banc* majority ruled that Mr. Fine failed to qualify as an "original source" in that, as an Inspector General employee for whom the duty to investigate and report fraud was the "paramount responsibility of his position," Mr. Fine could not satisfy the jurisdictional prerequisite of having "voluntarily provided" the information to the government. (Petition, App. 7a and 12a.) Specifically,

> [t]he government employed Fine to assist in its efforts to root out, disclose, and prevent fraud, and rewarded him with a salary and benefits. . . . His performance of his job responsibilities, including the provision to his superiors of the information that later formed the basis of these two suits, was not voluntary within the meaning of the False Claims Act.

(Petition, App. 13a-14a.)

The *en banc* majority did not address whether or not Mr. Fine satisfied any other statutory requirement for an original source, *i.e.*, that his knowledge of the information was "direct and independent," nor did it address whether Inspector General Auditors are precluded, as a matter of law, from bringing *qui tam* actions. Accordingly, the sole issue presented in this petition is whether Mr. Fine, having obtained his information as an Inspector General employee whose specific statutory duty was to investigate and report fraud, "voluntarily provided" the information to the government prior to commencing the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B).[1]

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[1] In addition to the majority opinion, the *en banc* decision contains: (1) a concurring opinion by Judge Kozinski which joins the majority

REASONS FOR DENYING THE WRIT

I.

The Majority *En Banc* Opinion Does Not Conflict With Any Other Circuit Court Decision and Is in Accord With the First Circuit's Opinion in *LeBlanc* Which This Court Has Already Declined to Review.

Petitioner's brief contains three citations (at pages 13, 17 and 20) to the First Circuit *LeBlanc* decision, which reached a result substantially in accord with the *en banc* majority in the instant action, but the petitioner never brings to this Court's attention the fact that a petition for a *writ of certiorari* was denied in that case. *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).

LeBlanc is the only prior circuit court opinion following the 1986 amendments to the False Claims Act which directly addressed the issue of whether a government employee whose specific job responsibilities are to audit or investigate for fraud, can qualify as an original source for purposes of bringing a *qui tam* action under the False Claims Act. In *LeBlanc*, the relator was employed as a quality assurance specialist for the United States Government Defense Contract Administrative Service and had a specific duty to uncover fraud as a condition of his employment. LeBlanc's *qui tam* action was based upon information obtained from his government employment. *Id.* at 18, 20.

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opinion and refutes the dissenting opinion's narrow construction of "voluntarily provided" (Petition, App. 14a-18a); (2) concurring opinions by Judge Hawkins (also joined by Judge Kozinski) and Judge Trott that express the view that Congress could not have intended that Inspector General Auditors receive bounties as *qui tam* relators for performing the statutorily mandated job duties and, accordingly, that they should be barred from bringing *qui tam* actions (Petition, App. 18a-24a); and (3) a dissent by two members of the original panel (Petition, App. 24a-28a).

The First Circuit ruled that a government employee in LeBlanc's position could not qualify as an "original source." *Id.* at 20.

> It was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer — the government. Thus, LeBlanc was not someone with "independent knowledge of the information" as required by the statute.

Ibid.

Both *LeBlanc* and the majority *en banc* opinion in this action concluded that a government employee whose primary and express job responsibility is to audit for or report fraud to his superiors cannot, for purposes of *qui tam* jurisdiction, be an original source of the government's information about that fraud. The two circuit courts reached that result via different portions of the original source jurisdictional tests (the First Circuit concluded that LeBlanc's knowledge was not "independent" and the Ninth Circuit concluded that Mr. Fine had not "voluntarily provided" the information to the government prior to filing the actions). Nonetheless, the two circuit courts are consistent in their refusal to accord original source status to a narrow class of government employees — whose duty to uncover fraud is the primary responsibility and a condition of their employment — and neither opinion purports to bar government employees completely from pursuing *qui tam* actions or satisfying the "original source" subject matter jurisdictional tests.

Petitioner is simply incorrect in asserting that the majority *en banc* holding conflicts with the opinion of the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). The relator in *Williams* was an attorney for the United States Air Force assigned as the

Chief of the Contracts Law Division at an air base in Japan who, during the course of his employment, became aware of bid-rigging on the part of a corporation seeking telecommunications contracts with the United States. *Id.* at 1495. At the time that Williams brought his *qui tam* action, the Justice Department was asserting that *all* government employees were barred from filing *qui tam* actions based upon information acquired through their work for the government. *Id.* at 1501-1507. Thus, the Eleventh Circuit's opinion in *Williams* addresses the broad general issue of whether government employees in general may bring *qui tam* actions based upon information acquired while working for the government. *Ibid.* The holding in *Williams* that the False Claims Act, as amended by the 1986 Amendments, contains no *general* preclusion against *qui tam* actions by federal employees cannot reasonably be said to conflict with the conclusion of the *en banc* majority below that Mr. Fine's particular job responsibilities as an Inspector General auditor precluded him from having "voluntarily provided" to the government information he was required to collect.[2] The relator in *Williams* was not specifically employed to uncover fraud; rather, he simply became aware of it during the course of government employment.[3]

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[2]In fact, the court in *Williams* observed that: "[A] government employee, like any other relator, can be barred from bringing a *qui tam* action if that action is based upon 'publicly disclosed' information and the employee is not an 'original source' of that information." *Id.* at 1501.

[3]Williams maintained that his investigations were not only extraneous to his job duties, they were conducted during non-work hours in the evenings and during weekends. *Id* at 1495 n.5.

II.

The Decision Below Is Not Inconsistent With the Legislative History of the 1986 Amendments to the False Claims Act.

Petitioner seeks to resurrect a distorted and erroneous interpretation in the original panel opinion of the legislative history of the 1986 amendments to the FCA which was repudiated by nine out of the eleven judges of the Ninth Circuit *en banc* majority. The flaw in the original panel's reading of the 1986 amendments was to conclude that a principal reason for the amendments was to encourage *government* employees to disclose fraud. (Petition, App. 40a.) As properly noted by the *en banc* majority, the main purpose of the 1986 amendments was to encourage *private government contractor* employees voluntarily to disclose fraud. (Petition, App. 6a-7a.) The *en banc* majority, citing numerous cases, observed that the paradigm *qui tam* case is one in which an insider at a private company brings an action against his own employer and that proper interpretation of the legislative history "suggests that Congress envisioned only this paradigm suit when enacting the current version of the *qui tam* provisions." (Petition, App. 6a.) The Senate report on the 1986 amendments to the FCA, for instance, states that "[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more *private* enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-5289 (emphasis added).[4]

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[4]There is one brief reference in the legislative history to a 1983 U.S. Merit Systems Protection Board Survey of 5,000 federal government employees which found widespread failure to report suspected fraud. *See id.* at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 5269-70. However, other than that one brief reference to the Merit Survey, *all* of the other examples and references to the failure to report fraud contained in the Senate Report expressly refer to what was clearly the central and

The *en banc* majority recognized that these cases here at issue involve the application of the FCA to a factual scenario Congress may never have envisioned, specifically, a case in which the relator was not simply a government employee but more precisely a government employee whose paramount job responsibility as an Inspector General Auditor was to disclose fraud and false claims to his supervisors. (Petition, App. 7a.) *See* 5 U.S.C. App. 3 § 4(d).[5] As to such a relator, there is nothing incongruous in reading the "voluntarily provided" requirement of the 1986 amendments as barring such a relator from qualifying as an "original source."

While it is true that Senator Grassley, a principal sponsor of the 1986 amendments, made a floor statement reported in the Congressional Record that the purpose of the "voluntarily provided" requirement is to prevent *qui tam* actions by a person who is "a source of the allegations only because the individual was subpoenaed to come forward" (132 Cong. Rec. S20,536 (daily ed. August 11, 1986) (statement of Senator Grassley)), it is improper and misleading to assert that Senator Grassley's remarks are all-inclusive. Senator Grassley's remark is quoted out of context, and it is clear when Senator Grassley's entire statement is reviewed that his comments do not constitute a comprehensive definition of "voluntarily provided." On that occasion, he also stated that "those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information" would be considered to have "volun-

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predominant concern of Congress: the failure of government contractor employees to step forward. *Id.* at 4-8, 14, *reprinted in* 1986 U.S.C.C.A.N. at 5269-73, 5279.

[5]The "principal mission" of the Office of the Inspector General is a "concern for preventing, deterring and identifying fraud, abuse and waste in agency operations and programs." S. Rep. No. 1071, 95th Cong., 2d Sess. 11-12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2686-87.

tarily" informed the government or the media. *Ibid.* Thus, he merely gave one example of a circumstance in which information would not be voluntarily provided and another where it would. Significantly, his example of what would constitute voluntary disclosure does not, by its terms, include information given to the government by government employees whose specific job responsibilities are to uncover fraud.[6]

III.

Because the Decision Below Bars as Original Sources Only a Narrow Class of Federal Employees, the Issue Raised by the Decision Below Is Not of Sufficient Importance to Warrant Review.

Petitioner greatly exaggerates the significance of the decision below by suggesting that it precludes all *qui tam* actions by federal employees. (Petition, p. 20.) To the contrary, the *en banc* majority specifically recognized with approval its prior decision in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). *Hagood* accepted the proposition that a federal employee may bring a *qui tam* action. (Petition, App. 12a n.5.) Similarly, the First Circuit in *LeBlanc* also stated that its decision did not constitute a general preclusion of *qui tam* actions by federal employees. *LeBlanc,* 913 F.2d at 20.

Relying on a common sense, dictionary-based interpretation of "voluntary," the *en banc* majority opinion excludes as original sources only a narrow class of federal employees who operate outside the paradigm of the *qui tam* plaintiff

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[6] In addition, Senator Grassley's example of what would constitute voluntary disclosure is inconsistent with the language adopted by Congress which contemplates that an original source must have voluntarily provided the information to the government, rather than to *either* the media or the government, as suggested by Senator Grassley.

envisioned by Congress (*e.g.*, employees of private contractors who sue their employers). The excluded class, in the words of the *en banc* majority, "defies the paradigm." (Petition, App. 7a.) The excluded class, government IG Auditors and other federal employees specifically hired to ferret out, report and prosecute fraud against the government, defies the paradigm because it consists of government agents who are required to play a central role in the government's war against fraud[7] and who clearly neither deserve nor need the incentive of potentially "staggeringly large" recoveries in order to do what they are already specifically required and paid to do as the paramount condition of their employment. (Petition, App. 9a-10a n.3.)

Petitioner's goal is to seek an interpretation of the *qui tam* jurisdictional provisions of the FCA which authorizes all federal government employees to pursue *qui tam* actions for private gain no matter how central an official role they already play in the Executive Branch anti-fraud efforts. Petitioner has not cited any evidence of Congressional intent in the legislative history of the 1986 amendments to the FCA to authorize and encourage private *qui tam* actions by government IG Auditors. The three Florida district court opinions relied upon by petitioner[8] were decided in response to broadbrush arguments by the Justice Department seeking to disqualify all federal employees as *qui tam* relators. None of the cases evaluate whether the duties of fraud and false

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[7] See *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1144-45 (D.C. Cir. 1987).

[8] *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992); *United States v. Stern*, 818 F. Supp. 1521 (M.D. Fla. 1993); *United States v. Enriquez*, No. 90-6105-CIV, 1991 U.S. Dist. LEXIS 15972 (S.D. Fla. July 12, 1991). All three of these cases involved the same relator, Leon Weinstein, a former Inspector General Investigator for the Department of Health & Human Services.

claims investigators, specifically empowered and required by statute to disclose fraud to their supervisors, render their disclosures involuntary for purposes of 31 U.S.C. § 3730(e)(4)(B).

The *qui tam* jurisdictional holdings of the *en banc* majority, although clearly correct, may raise issues for consideration in future cases as to the precise line of demarcation between disclosures which are voluntary and those which are not.[9] The *en banc* majority specifically declined in this case to go beyond its specific statutory construction to engage in a philosophical inquiry into the meaning of "voluntary." (Petition, App. 10a.) Presumably, in future cases, the line of demarcation will emerge; if conflicts among circuits occur, review by this Court may eventually be appropriate, but there is no need at this time for the Court to review the single narrow issue raised by petitioner.

IV.

The *En Banc* Majority Opinion Does Not Give Rise to a Perverse Incentive; if an IG Auditor Were to Bring a *Qui Tam* Action Based Upon Non-Public Audit Information, the Action Would Still Be Barred.

Petitioner contends that construing the original source "voluntarily provided" requirement to disqualify Inspector General employees creates a perverse incentive: it encourages such employees to file *qui tam* actions as soon as

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[9] For example, for purposes of refining the line of demarcation between voluntary and involuntary disclosures to the government, that it should be proper to distinguish between the core duty and mission of an Inspector General Auditor to ferret out and report fraud for the Executive Branch and the incidental duty of a state to monitor and report any fraud that comes to light while administering a major federal entitlement program, such as Medicaid. *But see United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

possible before the information gained from their investigation is publicly disclosed. (Petition, p. 15.) This argument assumes, incorrectly, that absent public disclosure, Inspector General Auditors would be entitled to appropriate such information for purposes of filing *qui tam* actions. Since public disclosure was conceded in these cases, the *en banc* majority was not required to and did not consider whether the False Claims Act permits *qui tam* actions by Inspector General Auditors based upon non-public information gained from their government employment. However, if an Inspector General auditor tried to bring a *qui tam* action based upon such non-public information, such an action would still be barred under one or more of the following rationales.

First, such an action would be barred under the reasoning in Judge Trott's concurring opinion below construing the False Claims Act in relation to the Inspector General Act, 5 U.S.C. App. 3 § 1 *et seq.* (Petition, App. 19a-22a.) Contrasting the intolerable conflicts of interest presented to inspector general employees between their duties under the Inspector General Act and the enticement of bounties under the False Claims Act, Judge Trott concludes, in reliance upon the statutory construction principles in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring), that Congress could never have intended that such Inspector General employees be entitled to use information from their audits and investigations, whether publicly disclosed or not, to pursue *qui tam* actions. (Petition, App. 21a-22a.)

Second, such an action would be barred under the agency and related rules referred to in the dissenting opinion below that preclude an employee from pursuing a business opportunity learned through his employment without notifying his employer and giving his employer a chance to pursue that opportunity. (Petition, App. 27a.)

Finally, if the foregoing rationales were not accepted, such an action would still be barred under separation of power principles. Construing the *qui tam* provisions of the False Claims Act to authorize private bounty hunting by federal fraud investigators, using information obtained from official investigations, would impermissibly undermine the Executive Branch in violation of separation of powers principles. *See Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("[W]e have not hesitated to strike down provisions of law . . . that undermine the authority and independence of one or another coordinate Branch.").

Although courts which have considered the issue to date, applying the constitutional separation of powers analysis set forth in *Morrison v. Olson*, 487 U.S. 654 (1988), have ruled that the *qui tam* provisions of the False Claims Act do not impermissibly infringe upon Executive Branch enforcement prerogatives, none of these cases have involved government employees specifically hired to investigate for fraud.[10]

This Court in *Morrison* held that the Ethics in Government Act restrictions on the Executive Branch power to supervise and remove independent counsel did not violate separation of powers principles. *Morrison*, 487 U.S. at 696-697. After analyzing the particular provisions of that Act, including the requirement that no action can be commenced without a specific request by the Attorney General,

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[10] *See e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749-755 (9th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1125, 127 L.Ed.2d 433 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154-1155 (2d Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2962, 125 L.Ed.2d. 663 (1993); *United States Dept. of Housing ex rel. Givler v. Smith*, 775 F. Supp. 172, 176-178 (E.D. Pa. 1991); *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 620-622 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607, 610-613 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters Inc.*, 714 F. Supp. 1084, 1086-96 (C.D. Cal. 1989).

this Court concluded that the Attorney General retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696.

While the Executive Branch may maintain "sufficient control" of False Claims Act litigation where *qui tam* actions are brought by government contractor employees or government employees who are not hired specifically to investigate or prosecute fraud, no control would be possible if the Executive Branch's own fraud and false claims investigators, or, say, an assistant United States attorney, were permitted to rush to the courthouse with non-public information from a pending investigation to file a *qui tam* action, thereby laying claim to some 30 percent of the government's recovery. Lacking control, the President would not be able to carry out his constitutional duty to enforce the FCA. As is stated in *Buckley v. Valeo*, 424 U.S. 1 (1976), "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take care that the law be faithfully executed.' Art. III, § 3." *Id.* at 138. All of the "perverse incentives" quoted with approval by the *en banc* majority from the *amicus* brief of the United States, quoted below, also illustrate how *qui tam* actions by employees of the Office of the Inspector General would impermissibly undermine the Executive Branch. (Petition, App. 12a-13a.)[11]

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[11] Such employees would have incentives:

> "[T]o spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and

The civil and criminal investigative powers conferred by Congress upon the Inspector General were intended to aid in the enforcement of the laws by the Executive Branch. Permitting the use of the sovereign's police and investigative powers for private gain would undermine both the Executive's authority and public confidence in the integrity of the law enforcement process. *Cf. Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 814 (1987).

If the federal employees who have been hired specifically to investigate, audit or prosecute criminal or civil fraud actions on behalf of the United States can use information gained from their employment to file *qui tam* actions for private gain, the President could neither adopt nor implement a coherent enforcement policy; decisions regarding the commencement of suit, litigation strategy, intervention, settlement and dismissal would be governed more by the self-interest of the employees concerned than by the President's law enforcement policy. The result would be frustration,

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> diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests. Contractors will be deterred from cooperating with Inspector General investigations and audits because they fear, legitimately, that their confidential work papers will be appropriated by Inspector General employees for their personal use in filing *qui tam* actions, rather than for legitimate governmental functions. Criminal prosecutions will be seriously compromised, since IG employees are often the government's prime witnesses in criminal and civil fraud cases, and their personal interest in the outcome of their audits and investigations will make their testimony highly impeachable. Public confidence in the integrity and impartiality of government audits and investigations will necessarily decrease."

(*Ibid.* (quoting the *amicus* brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9).)

not support, of the Executive Branch's anti-fraud claims, thereby defeating the very purpose of the 1986 Amendments.

In sum, the "perverse incentive" posited by petitioner is unfounded, and, as a hypothetical issue, is not a proper subject for review by this Court.

CONCLUSION

For reasons set forth above, we respectfully submit that the petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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(3)

No. 95-1445

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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES ex rel. HAROLD R. FINE,

Petitioner,

vs.

CHEVRON U.S.A. INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The False Claims Act (31 U.S.C. § 3729 *et seq.*) provides that a person may not maintain a *qui tam* action based upon publicly disclosed information unless that person was "an original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" in turn must have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

The question presented is: When petitioner investigated fraud and reported the information obtained to the government, as mandated by law and the express terms of his employment duties as an auditor in the Inspector General's Office, did petitioner "voluntarily" provide the information to the government so as to qualify as an "original source"?

RULE 29.6 LIST

Respondent Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation, which has issued shares to the public. Chevron U.S. A. Inc owns a percentage interest in Atlas Supply Company and Pembroke Capital Company, Inc., both of which issue shares to the public. Felix Oil Company, a subsidiary of Chevron Corporation, has also issued shares to the public.

Respondent Williams Brothers Engineering Company ("Williams Brothers"), and its subsidiaries and affiliates, have not issued shares to the public. Williams Brothers' parent company, Fluor Daniel, Inc., is a privately held company. Fluor Daniel's parent, Fluor Corporation, is a publicly held corporation.

Respondent Bechtel Petroleum Operators, Inc., and its parent companies, subsidiaries, and affiliates, have not issued shares to the public.

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STATEMENT OF THE CASE

Only one issue is presented in this case: application of the False Claims Act requirement that to be an "original source" a person must have "voluntarily provided" information to the government in order to maintain a *qui tam* action when, prior to the filing of the action, there has been public disclosure of the information upon which the action is based.

It is undisputed that petitioner, an auditor in the Inspector General's Office, was required — by law and by express terms of regulations governing his job duties — to investigate fraud and to make reports of his investigations to his employer, the government. It is also undisputed that the information upon which petitioner based his *qui tam* action was acquired in the performance of his job duties and that it was publicly disclosed prior to the filing of the action.

The Ninth Circuit determined only that, when petitioner acted under compulsion of law and his job duties, he did not "voluntarily" provide information. Other issues discussed in the petition — in particular, whether employees of the Inspector General's Office can *ever* act as *qui tam* plaintiffs or whether government employees generally should be allowed to so act — were not the subject of the Ninth Circuit's *en banc* opinion.

A. Statement of Facts.

Petitioner, Harold R. Fine, was previously employed as Assistant Manager of the Western Region Audit Office in the Office of Audits of the Office of the Inspector General at the United States Department of Energy (sometimes "OIG"). Fine's duties, responsibilities and powers while working in that capacity are set forth in and controlled by the Inspector General Act of 1978. 5 U.S.C. Appx. 3. By law, the Inspector General

(sometimes "IG") has the duty and responsibility to ferret out fraud, waste and abuse in programs overseen by various government agencies. 5 U.S.C. Appx. 3 § 4(a). As a part of his job duties, Fine was expressly required to document his findings, including any irregularities or illegal acts, and to report those findings to his superiors. Comptroller General Standards §§ 4.34-4.38, 6.46, 7.2-7.3, 7.6, 7.17-7.21.[1]

During his employment by the Inspector General's Office, Fine was responsible for supervising audits of the Naval Petroleum Reserve No.1, Elk Hills, California. The private contractors involved in operating that facility with the government included respondents in the first of these consolidated appeals (9th Cir. No. 93-15012). As Fine admits, these audits were a "part of his job responsibilities" and he "acquired the information upon which he based his amended complaint during the course of his OIG employment." Petition for Writ of Certiorari ("Pet."), p. 5. As Fine also admits, the information at issue "was publicly disclosed," and he therefore "was required under the FCA to demonstrate that he was an 'original source' of the information" (Pet., pp. 5, 6), in particular that he "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

B. Proceedings in the District Court.

Two months after retiring from his auditor duties, Fine filed a complaint under seal in the United States District Court for the Northern District of California.[2] The government subsequently

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1. The Inspector General Act provides that IG audits are to be governed by the Comptroller General Standards. 5 U.S.C. Appx. 3 § 4(b)(1)(A).

2. Fine also brought six other *qui tam* actions soon after retiring from government service: *United States ex rel. Fine v. University of California*, 821 (Cont'd)

declined to participate in the action, and the district court then ordered Fine's complaint unsealed and served on all defendants. Appellees, joined by the government as amicus, filed motions to dismiss under Rule 12(b)(1) and 12(b)(6) on the ground that the district court lacked subject matter jurisdiction over Fine's action because he did not qualify as an "original source" under the Act. The district court ruled that Fine was barred from maintaining the action on the ground that he did not qualify as an "original source," in that he neither voluntarily provided, nor was a direct and independent source of, the information upon which he based his action.

C. The Panel's Opinion.

A panel of the Ninth Circuit reversed, holding that Fine was an "original source" under the Act. *Inter alia,* the panel reasoned that, because (according to the panel) the False Claims Act was intended to "encourage" government employees to "speak up," Fine's disclosures were "voluntary" even though required by law and by the conditions of his employment. App. 39a-40a.

D. The *En Banc* Decision.

The Ninth Circuit granted rehearing *en banc*, vacated the panel decision, and affirmed the district court's dismissal for lack of subject matter jurisdiction. As Fine concedes (Pet., pp. 7-8), the main opinion (joined by seven of eleven judges) held solely that Fine, an Inspector General Office auditor who was compelled by law and his job duties to disclose the results of his

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F. Supp. 1356 (N.D.Cal. 1993) (the case consolidated with the instant case); *United States ex rel. Fine v. Advanced Sciences, Inc.*, CA No. 91-0774-SC (D.N.M.); *United States ex rel. Fine v. The Boeing Company*, CA No. 91-1357 (W.D. Wash.); *United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1554 (D. N.M. 1994); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995); *United States ex rel. [Under Seal].*

investigations to his employer — the government, had not "voluntarily disclosed" that information. Fine therefore did not fall within the exception that allows an "original source" to maintain a *qui tam* action when the information upon which the action is based has been publicly disclosed. App. 9a-10a.[3]

Judge Kozinski joined in the majority opinion and also filed a concurring opinion in which he discussed the dissenting opinion's view that "*any* action can be voluntary, even if the actor is subject to severe compulsion." App. 16a (emphasis in original). He pointed out that, although perhaps linguistically permissible, application of such a rule to the False Claims Act would make it objectively impossible to determine the voluntary nature of an act. *Id.* He also underscored why information gathered by Inspector General Office auditors should not be considered "voluntarily provided":

> The government pays salaries calculated to reward them for finding and turning over information about waste, fraud and abuse; it holds out the threat of discipline for failure to fulfill these duties; it imposes criminal sanctions for misusing or suppressing information obtained as part of an investigation.

App. 17a.

Judge Hawkins (also joined by Judge Kozinski) and Judge Trott would have reached a broader result. In two separate

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3. The Ninth Circuit, in ruling that Fine had not voluntarily provided the information to the government, noted that it was unnecessary to consider the district court's alternative holding that Fine was not a direct and independent source. App. 9a.

opinions, they expressed the view that Congress could not have intended that IG auditors be given extra rewards for performing their job duties and that accordingly they should be barred generally from bringing *qui tam* actions. App. 18a-24a.

Two judges who had been members of the original panel dissented. They continued to insist that Fine's reports to the government, even though compelled by law, were "voluntary" acts and that only those "subpoenaed to come forward" would not be acting "voluntarily" under the False Claims Act. App. 26a.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Fine first seeks to obtain this Court's interest by asserting (Pet., p. 12) that the Ninth Circuit's decision is in "direct conflict" with the opinion of the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). Fine is wrong. In *Williams*, there had been no public disclosure and, for that reason, the "original source" test did not apply:

> Because we find no "public disclosure" under section 3730(e)(4)(A), Williams's *qui tam* action is not jurisdictionally barred under that section. Therefore, *we need not reach the question of whether Williams was an "original source" of the information that formed the basis of his suit.*

931 F.2d at 1500 (emphasis added). The court also observed that:

> [A] government employee, like any other relator, can be barred from bringing a *qui tam* action if that action is based upon "publicly disclosed" information and the employee is not an "original source" of that information.

Id. at 1501. That, of course, is precisely what occurred in the instant case. The information upon which Fine based his action had been publicly disclosed, and Fine was not an original source.

The Ninth Circuit carefully limited its holding to the facts before it. Because Fine, as an auditor in the Inspector General's Office, "acted in exchange for valuable consideration — his salary — and under an employment-related obligation to do the very acts he claims were voluntary" (App. 10a-11a), his reports to the government were not "voluntarily provided" and he was not an original source. The court expressly declined (App. 11a-12a) to rule upon the issue whether government employees generally can qualify as original sources. The footnoted dictum in *Williams* upon which Fine relies for the purported "direct conflict" (931 F.2d at 1501 n. 14) addresses only that general issue, not the specific issue concerning government employees such as OIG auditors whose specific job duties, by law, are the investigation and reporting of fraud to their employer, the government. There is thus no conflict.

Fine also fails in his attempt to find "important and unresolved issues" arising from asserted "inconsistent and irresolute results" in four decisions by courts of appeals. *See* Pet., pp. 20-21. Two of the four decisions cited by Fine are the Eleventh Circuit's decision in *Williams* and the instant case which, as discussed, present no conflict or inconsistency. The third is the Tenth Circuit's decision in *United States ex rel. Fine*

v. Sandia Corporation, 70 F.3d 568 (10th Cir. 1995). There, the information at issue had been publicly disclosed, and the government had obtained it "without Mr.Fine's assistance." 70 F.3d at 571. In view of Fine's concession in that case that he was not an "original source," the court expressly observed that "we need not engage in an 'original source' analysis." *Id.* at 572. The court also declined to pass upon the broader issue of a potential conflict between the Inspector General Act and the False Claims Act. *Id.* at 570 n. 3.

The fourth decision cited by Fine in this regard, *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), also presents no conflict or inconsistency. In that case, the First Circuit held that, although there was no general bar against government employees acting as *qui tam* plaintiffs, the plaintiff in that case was not an original source when it was his "responsibility, a condition of his employment, to uncover fraud." 913 F.2d at 20. Thus, that decision is in accord with the decision of the Ninth Circuit in the instant case.[4]

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4. Nor do the district court decisions cited by Fine present any conflict. In *United States ex rel. Fine v. M.K. Ferguson Co.*, 861 F. Supp. 1544 (D. N.M. 1994), Fine "basically mimic[ked]" information that had already been publicly disclosed. 861 F. Supp. at 1554. For that reason, he was not an original source, and the court expressly noted that it was therefore unnecessary to determine whether he had "voluntarily provided" the information. *Id.* In *United States v. Stern*, 818 F. Supp. 1521 (M.D. Fla. 1993), there had been no public disclosure and therefore the "original source" test was not involved. 818 F. Supp. at 1522. The unpublished district court decision in *United States v. Enriquez*, No. 90-6105, 1991 WL 236502 (S.D. Fla. 1991), which involved a Department of Health and Human Services special agent and not an OIG investigator as asserted by Fine (Pet., p. 13), did not address the issue of when information is "voluntarily provided" to the government.

II.

PETITIONER MISSTATES THE LEGISLATIVE HISTORY.

Fine refers to three aspects of the legislative history of the False Claims Act. None supports him. Indeed, to the extent that the cited legislative history is relevant, it supports the Ninth Circuit's interpretation of "voluntarily provided" in the "original source" test.

First, Fine places heavy reliance upon a single floor statement by Senator Grassley, a sponsor of the 1986 amendments to the Act. Pet., pp. 13-14. In context, that statement sets forth simply an example, *i.e.*, providing information under compulsion of a subpoena, of what should not be deemed to be "voluntary" under the original source test. As the Ninth Circuit noted:

> On its face, Senator Grassley's statement does not purport to describe the *only* situation in which the voluntary disclosure requirement would bar a qui tam suit following a public disclosure.

App. p. 11a (emphasis by court). In any event, even if Senator Grassley had purported to define "voluntary" in such a circumscribed sense, his statement could not be determinative. As this Court has held, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).[5]

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5. Citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990), Fine asserts that "[t]he statements of Senator Grassley are . . . definitive." Pet., p. 14. It would be surprising indeed if, contrary to this

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Moreover, had Congress intended the limited provision advocated by Fine, it would have utilized express language to that effect, stating for example that a *qui tam* action could be maintained when a party "has provided, other than as compelled by subpoena or civil investigative demand, the information" rather than the substantially broader "has voluntarily provided the information." This is particularly true where, as in the instant case, Congress simultaneously enacted new provisions of the False Claims Act making reference to means of compulsory provision of information. Legislative History ("Leg. Hist."), Pub. L. No. 99-562, False Claims Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess., *reported at* 1986 U.S. Code Cong. & Admin. News, p. 5298; 31 U.S.C. § 3733(a) (relating to "Civil Investigative Demand"); 31 U.S.C. § 3804 (relating to "subpoena"). " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, Fine relies on the original Ninth Circuit panel's assertion that the 1986 amendments to the False Claims Act were intended to cure an asserted "conspiracy of silence" among government employees who failed to report instances of fraud. Pet., p. 14 *and see* App. 40a. In fact, the panel's view of the legislative history was in error. A full reading of the applicable legislative history shows that Congress' concern was with

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Court's observation in *Chrysler Corp.*, a court of appeals were to attribute "definitive" status to the statement of a particular legislator. And the opinion in *Dick* does not do so. Rather, the court cited a comment by Senator Grassley, together with other legislative history, in support of its conclusion that, in order to be an original source, a party must have been a source to the entity that made the first public disclosure (912 F.2d at 17-18) — an issue not involved here.

"*government contractor* employers" and "the conspiracy of 'silence' *among contractor* employees" (Leg. Hist., pp. 5269-71) (emphasis added), not with the government as an employer and a "conspiracy of silence" among government employees.[6] Indeed, "[t]he paradigm *qui tam* plaintiff is the 'whistleblowing insider.' " *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *accord: United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1161 (3d Cir. 1991). Fine is not such a person. He was employed to discover and report fraud; he suffered no risks in disclosing it, and he needed no extra incentive to do so.

Finally, Fine contends that the 1986 amendments to the False Claims Act were intended to "correct" the result in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) and that:

> What concerned Congress and what Congress corrected when it enacted the 1986 amendments was the inability of persons to prosecute *qui tam* actions based on information they were required by law to disclose to the government.

Pet., p. 16. There is no support — in either the legislative history

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6. The panel opinion misleadingly set forth, in what appeared to be a single quotation, what were in fact two separate excerpts from the legislative history. *See* App. 40a. The first such excerpt contains the *only* mention of federal government employees in the entire 46-page legislative history. It appears to have been included as the only available statistical evidence of the unwillingness of employees in general to expose illegalities concerning fraud. Leg. Hist., p. 5269. The second excerpt is from a portion of the legislative history two pages later. Leg. Hist., p. 5271. That portion of the legislative history addresses "the so-called 'conspiracy of silence'" identified in the legislative history as "the 'conspiracy of silence' among *contractor employees*." Leg. Hist., pp. 5270-71 (emphasis added).

or case law — for Fine's assertion that, in enacting the 1986 amendments, Congress had a particular concern directed toward persons who were required by law to disclose information to the government. It is, of course, generally recognized that Congress was dissatisfied with the *Dean* opinion's interpretation that barred *qui tam* suits by *all* parties who, prior to filing *qui tam* actions, had provided information to the government. *See* Leg. Hist., pp. 5278-79. Under the initial drafts of the 1986 amendments, *any* person, whether or not required by law to disclose information to the government, could have brought a *qui tam* action if the government had been in possession of the information for six months but had not acted upon it. *See* discussion of legislative history in *Houck on Behalf of United States v. Folding Carton Admin.*, 881 F.2d 494, 504 (7th Cir. 1989); *United States ex rel. LaValley v. First Nat. Bank of Boston*, 707 F. Supp. 1351, 1356 (D. Mass. 1988).

Congress, however, wished to continue to bar "parasitic lawsuits" by persons exploiting information already in the possession of the government. *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651, 654 (D.C. Cir. 1994); *United States ex rel. Kreindler v. United Technologies*, 985 F.2d 1148, 1157 (2d Cir. 1993). In doing so, it sought to advance the "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Springfield, supra*, 14 F.3d at 651.

Accordingly, Congress rejected the broad proposed provisions that would have allowed any person to file a *qui tam* action if the government had not acted within six months. Instead, Congress barred actions based upon publicly disclosed information *except* when the "original source" test was met. Hence, it cannot be disputed that Congress intended to bar *some qui tam* actions by persons who disclosed information to the

government. The issue here is simply application of the "original source" test to the facts of this case; in particular, whether a disclosure by a government employee is "voluntary" when that employee's sole job duties — as compelled by statute and governing federal regulation — were the investigation and reporting of fraud to the government.

As discussed above, the Ninth Circuit correctly decided that such a disclosure is not "voluntary." The broader issues posited by Fine, including application of the "original source" test generally to all persons who may be under some obligation to disclose information to the government, were not the subject of the Ninth Circuit's opinion and are not presented by this case. The precise parameters of the "original source" test will, presumably, be defined in subsequent cases dealing with varying factual situations.[7]

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7. One aspect of the legislative history, not discussed by Fine, indicates that his arguments with respect to disclosures required by law may not be well founded, at least when the person disclosing information was under a legal duty both to investigate fraud and to report the results of the investigation to the government. In the *Dean* case, Wisconsin had relied upon a provision of the 1983 version of the False Claims Act that allowed certain *qui tam* actions when a party had "voluntarily disclosed" the information to the government. 729 F.2d at 1106. The court in *Dean* rejected Wisconsin's reliance on that provision, noting that Wisconsin had been required by statute and federal regulation to investigate and report the fraud at issue. *Id.* The court concluded that "*such information was not, therefore, 'voluntarily disclosed.'*" *Id.* (emphasis added).

Congress was obviously aware of the *Dean* court's conclusion that a party who investigated and provided information under compulsion of statute and regulation did *not* act "voluntarily." With that knowledge, Congress mandated that information must be "voluntarily provided" in order for a person to be an "original source" under the False Claims Act. In light of this legislative history, it appears that, while Congress intended to "correct" *Dean* to allow some *qui tam* actions by persons who had provided information to the

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III.

PETITIONER'S POLICY ARGUMENTS ARE MISGUIDED AND MISDIRECTED.

Fine argues fervently that, for policy reasons, employees of the Office of the Inspector General should be able to act as *qui tam* plaintiffs regardless of public disclosure of the information upon which their actions are based and regardless of the fact that their express job duties required them to supply that information to the government. *See* Pet., pp. 20-21. Fine also argues that application of the "original source" test in varying contexts may have anomalous results. *See* Pet., pp. 15, 18-19.[8]

As discussed, most of Fine's arguments and concerns are

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government, Congress did *not* intend that *qui tam* actions should be maintained by persons who had investigated fraud and provided the information to the government under compulsion of the express requirements of statute and federal regulation.

8. While Fine cavalierly dismisses (Pet., p. 19) the government's policy arguments in support of a sensible reading of "voluntary" (*see* App. 12a-13a) as a "chamber of horrors," he puts forth a "horror" of his own:

> Under the *en banc* majority's holding, government employees such as petitioner would be encouraged to race to the courthouse the instant they suspect fraud against the government so as to avoid the risk of public disclosure of their information rather than, like petitioner, voluntarily bringing their findings to their supervisors (or any other government officials who might listen) in an attempt to have the government take action.

Pet., p. 15. Fine ignores the fact that such action would be a blatant violation of an IG auditor's express job duties.

directed to facts not presented in the instant case. However, even if Fine were in some respects correct (and, as discussed herein, it is submitted that he is not), he should heed his own advice as to the proper forum in which to advance policy arguments. *See* Pet., pp. 18-19. Congress made the "original source" test an integral part of the False Claims Act. Anyone who is dissatisfied with a straightforward application of that test should take his or her case to Congress, not to the courts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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